No. 00-189-CFX Title: Idaho, Petitioner
v.
United States, et al.

Docketed: August 7, 2000 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Jul 25 2000	Petition for writ of certiorari filed. (Response due November 6, 2000)
	Sep 1 2000	Order extending time to file response to petition until October 6, 2000.
	Sep 1 2000	This extension of time is granted for all respondents.
	Sep 6 2000	Brief amici curiae of Benewah County and Kootenai County of Idaho filed.
	Oct 3 2000	Order further extending time to file response to petition until November 6, 2000.
	Nov 3 2000	Brief of respondent Coeur D'Alene Tribe in opposition filed.
	Nov 6 2000	Brief of respondents United States, et al. in opposition filed.
	Nov 15 2000	Reply brief of petitioner Idaho filed.
	Nov 21 2000	DISTRIBUTED for Conference of December 8, 2000
	Dec 11 2000	Petition GRANTED. SET FOR ARGUMENT April 23, 2001. **********
	Jan 25 2001	Joint appendix filed.
	Jan 25 2001	Joint appendix in two volumes.
	Jan 25 2001	Brief of petitioner Idaho filed.
	Jan 25 2001	Brief amicus curiae of Benewah County and Kootenai County of Idaho filed.
	Jan 25 2001	Brief amici curiae of California, et al. filed.
	Feb 12 2001	Order extending time to file respondents' brief on the merits to and including March 16, 2001. A reply brief, if any, is to be filed on or before April 16, 2001. Rule 29.2 does not apply.
	Feb 22 2001	CIRCULATED.
	Feb 27 2001	Record filed.
	Feb 28 2001	Record filed.
	Mar 16 2001	Brief of respondent United States filed.
	Mar 16 2001	Brief of respondent Coeur D'Alene Tribe filed.
	Mar 26 2001	Motion of respondent Coeur D'Alene Tribe for divided argument filed.
	Mar 30 2001	Motion of respondent Coeur D'Alene Tribe for divided argument DISTRIBUTED.
	Apr 2 2001	Motion of respondent Coeur D'Alene Tribe for divided argument GRANTED.
	Apr 12 2001	Reply brief of petitioner Idaho filed.
	Apr 23 2001	ARGUED.

Supreme Court, U.S.
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No. 00 189

In The

Supreme Court of the United States

STATE OF IDAHO,

Petitioner,

v.

UNITED STATES OF AMERICA
and COEUR D'ALENE TRIBE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *United States v. Alaska*, 521 U.S. 1 (1997), this Court held, in the context of a statehood act, that congressional ratification of an executive order reservation known to include submerged lands may imply an affirmative intent to defeat state title to the submerged lands. This petition presents the related question of whether a defeat of state title to submerged lands is implied when Congress, in a pre-statehood act, authorizes cession negotiations with an Indian tribe for the purpose of removing submerged lands from the executive order reservation they occupy.

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PETITION FOR A WRIT OF CERTIORARI

The State of Idaho petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The decision of the Ninth Circuit Court of Appeals (App. 1-30) is reported at 210 F.3d 1067 (9th Cir. 2000). The decision of the district court (App. 31-86) is reported at 95 F. Supp. 2d 1094 (D. Idaho 1998).

JURISDICTION

The court of appeals entered its judgment on May 2, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article 4, Section 3, Clause 2 of the United States Constitution provides in relevant part as follows:

> The congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.

The 1889 Indian Department Appropriations Act provides in relevant part as follows:

> That the Secretary of the Interior be, and he is hereby, authorized and directed to negotiate with the Coeur d'Alene tribe of Indians for the

> purchase and release by said tribe of such portions of its reservation not agricultural and valuable chiefly for minerals and timber as such tribe shall consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress and for the purpose of such negotiation, the sum of two thousand dollars, or so much thereof as may be necessary, is hereby appropriated; the action of the Secretary of the Interior hereunder to be reported to Congress at the earliest practicable time.

Act of March 2, 1889, 25 Stat. 980, 1002.

Also relevant to the court of appeals' decision were those portions of the 1891 Indian Department Appropriations Act that ratified two cession agreements with the Coeur d'Alene Tribe. Act of March 3, 1891, 26 Stat. 989, 1027. The relevant provisions in the 1891 Act are reproduced in the attached appendix at App. 87-98.

STATEMENT

On March 3, 1889, Congress appropriated funds to negotiate an agreement with the Coeur d'Alene Tribe for the cession of a portion of the reservation they occupied, which had been set aside sixteen years earlier by executive order. On May 2, 2000, the United States Court of Appeals for the Ninth Circuit found that in doing so, Congress had impliedly defeated the future State of Idaho's title to submerged lands within the Coeur d'Alene Indian Reservation.

The court of appeals' decision upsets a century of State ownership. For over 100 years, Idaho has safeguarded Coeur d'Alene Lake and the St. Joe River as vital public resources, guaranteeing every citizen access for

diverse uses such as commerce, fishing, swimming and boating. The State has been an active manager of these important resources. Since statehood, it has protected the public's interest in the open use of Coeur d'Alene Lake. *See Shephard v. Coeur d'Alene Lumber Co.*, 101 P. 591, 592 (Idaho 1909) (declaring that Coeur d'Alene Lake "is a public highway"). With federal cooperation, it has set apart lands and waters adjacent to the St. Joe River as a public park. 1911 Idaho Sess. Laws 334. In 1927, the State appropriated the water in Coeur d'Alene Lake "in trust for the people of the state of Idaho," in order to preserve the water "for scenic beauty, health, recreation, transportation and commercial purposes . . . . " Idaho Code § 67-4304 (1995). At the same time, the State declared the submerged lands under the Lake "to be devoted to a public use in connection with the preservation of said [lake] in [its] present condition as a health resort and recreation place for the inhabitants of the state . . . . " Idaho Code § 67-4305 (1995).

The unique role that Coeur d'Alene Lake has played in the history of Idaho is jeopardized by the recent decision of the Ninth Circuit Court of Appeals. The decision of the court of appeals, as well as that of the district court, both rely heavily on a recital of historical facts, starting with President Andrew Johnson's 1867 executive order that withdrew a small reservation for the use of the Coeur d'Alene Tribe. The 1867 Reservation was centered around the agricultural land of the Hangman Valley, about 20 miles south of Coeur d'Alene Lake. App. 32. Although its boundaries were never surveyed, it did not include any significant portion of the navigable waters at issue here. App. 32-33. The 1867 Reservation was never formally accepted by the Tribe, and, in 1873, representatives of the United States and the Tribe held negotiations

and agreed to establish a larger reservation of 598,000 acres. App. 33. The agreed-upon boundaries included almost all of Coeur d'Alene Lake, along with the lower portions of the Coeur d'Alene River and the St. Joe River, and the upper portion of the Spokane River. App. 33. The inclusion of the Lake was, in part, a response to tribal demands based on fishing needs, App. 56-57, a need the Tribe itself described as temporary pending its transformation to an agricultural economy.[1]

Following the conclusion of the negotiations, President Ulysses S. Grant withdrew the agreed-upon reservation from the public domain. App. 34-35; map, App. 99.[2] The executive order was intended as a temporary withdrawal of lands from sale until such time as Congress established a permanent reservation. App. 35.[3] For various reasons, however, the bill to ratify the 1873 Agreement was withdrawn from consideration, and so the executive order withdrawal remained in place. It was not

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[1] In an 1872 petition to the Commissioner of Indian Affairs, the Tribe affirmed its commitment to an agricultural economy, but admitted that "we are not yet quite up to living on farming," and stated that "for a while yet we need have some hunting and fishing." App. 51 (quoting petition of November 18, 1872).

[2] The map in the appendix was prepared specifically for inclusion in this brief, and was not part of the record below.

[3] On its face, the 1873 executive order states: "It is hereby ordered that the following tract of country in the Territory of Idaho be, and the same is hereby, withdrawn from sale and set apart as a reservation for the Coeur d'Alene Indians . . . . " Executive Order of November 8, 1873, 1 Charles J. Kappler, *Indian Affairs: Laws and Treaties* 837 (1904). The letter from the Commissioner of Indian Affairs that requested the executive order proposed setting apart the reservation "[i]n order that the tract may be protected from trespass by white persons pending the action of Congress upon [the 1873] agreement . . . . " App. 57.

until 1886 that Congress authorized new negotiations with the Tribe. Act of May 15, 1886, 24 Stat. 29, 44. The authorized negotiations occurred in 1887, resulting in a proposed agreement that would have confirmed the 1873 boundaries and extinguished all claims of aboriginal title outside those boundaries. The agreement was sent to Congress for ratification (hereinafter the "1887 Agreement"). App. 68.

Subsequent events, however, highlighted the inclusion of the Lake within the exterior boundaries of the Reservation, and spurred Congress to suspend its review of the 1887 Agreement. In 1880, steamboats started using the Lake to transport men and goods between the city of Coeur d'Alene and a landing on the Coeur d'Alene River that served mining camps in the Silver Valley. App. 69. A portion of the transported goods consisted of liquor. App. 69. When this liquor trade was discovered in 1886, the Department of Interior moved quickly to quash the transportation of liquor across the Lake, citing statutes prohibiting the introduction of liquor into "Indian country." App. 69. Around this same time, the Army began ejecting non-Indians using the lake for camping and fishing. App. 70.

Word of these actions apparently got back to Congress, for in 1888 the Senate passed the following resolution:

> Whereas it is alleged that the present area of the Coeur D'Alene Indian Reservation, in the Territory of Idaho, embraces 480,000 acres of land; that there are, according to the statistics in the Indian Bureau, only about 476 Indians in the tribe now occupying such reservation, or more than 1,000 acres to each man, woman, and child; that Lake Coeur D'Alene, all the navigable waters of Coeur D'Alene River, and about 20

miles of the navigable part of Saint Joseph River, and part of Saint Mary's, a navigable tributary of the Saint Joseph, are embraced within this reservation, except a shore-line of about 3½ miles at the north end of the lake, it being alleged that this lake and its rivers tributary constitute the most important highways of commerce in the Territory of Idaho, and are in fact the only navigable waters, except Snake River, now used for steam-boat navigation in the Territory; that all boats now entering such waters are subject to the laws governing the Indian country and all persons going on such lake or waters within the reservation lines are trespassers; and

Whereas it is further alleged that the Indians now on such reservation are located in the extreme southwest corner of the same around De Smedt Mission, near the town of Farmington, in Washington Territory, where the land is good for agriculture; and it being further alleged that all that part of such reservation lying between Lake Coeur D'Alene and Coeur D'Alene River and that part between the Coeur D'Alene River and Saint Joseph River is a territory rich in the precious metals and at the same time being of no real use or benefit to the Indians: Therefore,

Resolved, That the Secretary of the Interior be, and he is hereby, directed to inform the Senate as to the extent of the present area and boundaries of the Coeur D'Alene Indian Reservation in the Territory of Idaho; whether such area includes any portion, and if so, about how much of the navigable waters of Lake Coeur D'Alene, and of Coeur d'Alene and St. Joseph Rivers; about what proportion of said reservation is agricultural, grazing and mineral land

> respectively; also the number of Indians occupying such reservation; also on what portion of such reservation the Indians now thereon are located; also whether, in the opinion of the Secretary, it is advisable to throw any portion of such reservation open to occupation and settlement under the mineral laws of the United States, and, if so, precisely what portion; and also whether it is advisable to release any of the navigable waters aforesaid from the limits of such reservation.

S. Misc. Doc. No. 36, 50th Cong., 1st Sess. (1888).

Several weeks later the Secretary of Interior responded by forwarding a report prepared by the Commissioner of Indian Affairs. The Commissioner's report concluded that "the reservation appears to embrace all the navigable waters of Lake Coeur d'Alene, except a very small fragment cut off by the north boundary of the reservation which runs 'in a direct line' from the Coeur d'Alene Mission to the head of the Spokane River." S. Ex. Doc. No. 76, 50th Cong., 1st Sess. 3 (1888). The Commissioner then turned to the question of "whether it is desirable to release any of the navigable waters mentioned in the resolution from the limits of said reservation." *Id.* at 4. The Commissioner began by stating: "In approaching this question [of release of navigable waters], I deem it proper to refer briefly to the character and condition of the Indians occupying the reservation and the situation of affairs as existing amongst them." *Id.* at 5. He then went on to describe what was viewed by federal officials as a remarkable transformation in the Tribe's economy. He noted that members of the Tribe "cultivate the soil extensively, live in comfortable houses, dress like the whites, wear short hair, and in all other respects live and dress as

white people do . . . . They own large bands of cattle and horses and an abundance of hogs and poultry." *Id.* at 5.

The Commissioner concluded that "[t]here are few Indians in the entire country, if we except the five civilized tribes, who are as far advanced . . . . " *Id.* The Commissioner also noted that members of the Tribe did not reside by the Lake, stating his belief that "all, or nearly all" of the tribal members lived on farmlands in the Hangman's Creek area "lying south of the Lake Coeur d'Alene and St. Joseph River." *Id.* at 4. After reciting all the above facts relating to the Tribe's needs, the Commissioner concluded that:

> [M]y own opinion is that the reservation might be materially diminished without detriment to the Indians, and that changes could be made in the boundaries for the release of some or all of the navigable waters therefrom, which would be of very great benefit to the public; but this should be done, if done at all, with the full and free consent of the Indians, and they should, of course, receive proper compensation for any land so taken.
>
> Just what portion of the reservation and navigable waters should be segregated from the reservation, I am unable to say. That, I think, should be determined by negotiations with the Indians.
>
> . . . .
>
> In conclusion I will state that in my opinion these Indians have all the original Indian rights in the soil they occupy. They claimed the country long before the lines of the reservation were defined by the executive order of 1873, and the present reservation embraces only a portion of the lands to which they laid claim. I think that when the present agreement [i.e., the 1887 Agreement] shall have been ratified it will be an

> easy matter to negotiate with them for the cession of such portions of their reservation as they do not need, including all or a portion of the navigable waters, upon fair and very reasonable terms.

Id. at 6-7.

Although the Commissioner of Indian Affairs recommended ratification of the 1887 Agreement prior to any new negotiations, Congress refused to do so, apparently because of the concern that such ratification would have confirmed the inclusion of the Lake within the Reservation.[4] Instead, Congress directed further negotiations with the Tribe for a cession of a portion of the Reservation. Act of March 2, 1889, 25 Stat. at 1002. As the court of appeals found, "the main purpose of the new negotiations was to regain from the Tribe whatever submerged lands it was willing to sell." App. 22, n.14.

The authorized negotiations were completed on September 9, 1889. 26 Stat. at 1030. The Tribe agreed to cede the northern portion of the Reservation. App. 7. The boundaries of the diminished Reservation bisected the Lake, with the southern third of the Lake remaining within the boundaries of the Reservation, while the

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[4] The House Committee on Indian Affairs reported that the 1887 Agreement was "not ratified for sundry reasons, among which was a desire on the part of the United States to acquire an additional area, to wit, a certain valuable portion of the reservation specifically dedicated to the exclusive use of said Indians under an Executive order of 1873 . . . [that] contains a magnificent sheet of water, the Coeur d'Alene Lake, and its chief tributary, to wit, the Coeur d'Alene River, over the waters of which steamers now ply daily." H.R. Rep. No. 1109, 51st Cong., 1st Sess. 4 (1890).

northern two-thirds of the Lake, along with the surrounding uplands, were excluded from the Reservation. App. 7; map, App. 99.

The 1889 Agreement, along with the still-unratified 1887 Agreement, were transmitted to Congress for ratification on December 18, 1889. H.R. Rep. No. 2988, 51st Cong., 1st Sess. 26 (1890). The Agreements were bundled as a package for consideration, partly because the Tribe had insisted on the inclusion of a provision stating that the 1889 Agreement would not be binding on either party until ratification of the 1887 Agreement. App. 8.

Although the Senate passed a bill ratifying the 1887 and 1889 Agreements on June 7, 1890, 21 Cong. Rec. 5769-70, the House did not hold a vote on the bill that year, and the Agreements were not ratified until passage of the Indian Department's 1891 annual appropriation bill on March 3, 1891. 26 Stat. at 1027, App. 87-98. In the interim, Congress had admitted Idaho as the 43rd State. Idaho Admission Bill, Act of July 3, 1890, 26 Stat. 215.[5]

As noted above, following its admission, Idaho exercised unfettered jurisdiction and rights of ownership over the submerged lands within the Reservation without challenge from the federal government. In 1991, however, the Coeur d'Alene Tribe brought a quiet title action against the State of Idaho in federal district court. The Tribe claimed ownership of submerged lands within both the current and former boundaries of the Coeur d'Alene

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[5] The Idaho State Constitution contains a provision disclaiming title to lands "owned or held by any Indians or Indian tribes." Idaho Const. art. 21, § 19. Although the district court cited this provision as supporting its decision, App. 81-82, the court of appeals, in reaching its conclusions, expressly disclaimed any reliance on this provision. App. 24.

Reservation. The Tribe's original claims against the State were dismissed as a violation of the State's sovereign immunity, an action later upheld by this Court in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997). Following the initial dismissal of the Tribe's claims, the United States brought a quiet title action on the Tribe's behalf, in which the Tribe intervened. The United States invoked federal court jurisdiction under 28 U.S.C. §§ 1331, 1345, and 2202. The United States' action claimed title only to submerged lands within the current boundaries of the Coeur d'Alene Reservation, excluding submerged lands within Heyburn State Park, which lies within the Reservation boundaries. Following a two week trial, the federal district court for the District of Idaho issued a decision recognizing federal and tribal title to submerged lands within the current boundaries of the Coeur d'Alene Reservation, namely the lower third of Coeur d'Alene Lake and the lower reach of the St. Joe River. App. 31-86. The State appealed.[6] The court of appeals affirmed the district court's decision. App. 1-30.

The State seeks review of the court of appeals' decision and the restoration of the public's ownership of Coeur d'Alene Lake and the St. Joe River.

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[6] The Tribe also filed a cross-appeal relating to the district court's refusal to hear the Tribe's claims to submerged lands within Heyburn State Park, which were excluded from the United States' complaint. The court of appeals denied the cross-petition, and the State does not, in this petition, raise any issues relating to ownership of submerged lands within Heyburn State Park.

REASONS FOR GRANTING THE PETITION

1. Background.

As discussed in detail below, the court of appeals' decision presents irreconcilable conflicts with the decisions of both this Court and the Idaho Supreme Court. The depth of these conflicts is best appreciated against the background of this Court's prior submerged lands decisions. This Court has repeatedly affirmed that each State's ownership and control of the beds and banks of navigable waters is "an inseparable attribute of the equal sovereignty guaranteed to it upon admission [to the Union]." *United States v. Louisiana*, 363 U.S. 1, 16 (1960). Submerged lands possess a "perceived public character . . . which underlies and informs the principle that these lands are tied in a unique way to sovereignty." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 286 (1997).

Ownership of submerged lands is guaranteed to each individual State "by the Constitution itself." *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977).[7] Before the assumption of statehood, however,

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[7] The constitutional guarantee of state title to submerged lands arises under the principle that each state is admitted to the Union on an equal footing with the thirteen original states, so that all States "have the same rights, sovereignty and jurisdiction . . . as the original states possess within their respective borders." *Mumford v. Wardwell*, 73 U.S. (6 Wall.) 423, 436 (1867). The original thirteen states own the lands underlying navigable waters within their boundaries as the sovereign successors to the English crown. *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 410 (1842). Thus, under the equal footing doctrine, all subsequently admitted states hold the same sovereign title to the lands underlying navigable waters within their respective boundaries. *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 223 (1845).

Congress, having the entire dominion and sovereignty over the territory, may convey specific submerged lands to third parties, or reserve perpetual federal ownership of specific submerged lands. *Utah Div. of State Lands v. United States*, 482 U.S. 193, 197 (1987); *United States v. Alaska*, 521 U.S. 1, 33-34 (1997). When Congress does so, it necessarily defeats the title of the future State to those same submerged lands. Congress' authority to defeat state title to submerged lands can only be exercised up to the point of statehood. Afterward, state title to submerged lands is absolute. *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. at 374.

While Congress has the authority, during the territorial period, to defeat state title to submerged lands, congressional policy is to hold submerged lands "for the ultimate benefit of future States." *Utah Div. of State Lands*, 482 U.S. at 197, quoting *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926). Congress' policy of retaining submerged lands in trust for future States creates a "strong presumption against conveyance by the United States." *Montana v. United States*, 450 U.S. 544, 552 (1981). Because of this presumption, the Court will not infer an intent to defeat state title to submerged lands "unless the intention was definitely declared or otherwise made very plain." *United States v. Holt State Bank*, 270 U.S. at 55.

When submerged lands are located within the exterior boundaries of a federal reservation, the Court has an even higher threshold for inferring intent to defeat state title, since "[t]he land remains in federal control, and therefore may still be held for the ultimate benefit of future States." *Utah Div. of State Lands*, 482 U.S. at 202. Thus, a court may not "infer an intent to defeat a State's equal footing entitlement from the mere act of reservation

itself." *Id.* Instead, the United States is required to establish (1) that there was a clear intent to include the submerged lands within the reservation, and (2) that "Congress affirmatively intended to defeat the future State's title to such land." *Id.*

Recently, the Court expanded its analysis to address reservations originally established by executive order. In such cases, the first prong of the test, intent to include submerged lands within the reservation, may be fulfilled by executive action. *United States v. Alaska*, 521 U.S. at 45-46. The second part of the test is fulfilled where Congress, after being put on notice that the executive reservation includes submerged lands, ratifies such inclusion. *Id.* at 44-45. An intent to ratify the reservation is found where Congress "explicitly recogniz[es], at the point of . . . statehood, an Executive reservation that clearly included submerged lands," *id.* at 44, or where Congress "acknowledged" continuing federal ownership of the reservation in the statehood act. *Id.* at 45. Congress must speak in plain language that "reflects Congress' intent to ratify the inclusion of submerged lands within the Reserve and to defeat the State's title to those lands." *Id.* at 46.

2. The court of appeals' decision presents irreconcilable conflicts with decisions of the Idaho Supreme Court.

The Idaho Supreme Court has repeatedly applied the above principles to affirm the State's title to the submerged lands of Coeur d'Alene Lake. In *Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085 (Idaho 1983), the court addressed a dispute over a grant, by the Idaho Department of Lands, of a lease of submerged lands for private docking facilities on Coeur

d'Alene Lake. In affirming the lease, the court confirmed that the "State of Idaho holds title to the beds of all navigable bodies of water below the natural high water mark for the use and benefit of the public." *Id.* at 1088. In *Erickson v. State of Idaho*, 970 P.2d 1 (Idaho 1998), the court reviewed a district court decision establishing the ordinary high water mark (OHWM) of Coeur d'Alene Lake. In doing so, it stated that "[i]t is well established that the State owns in trust for the public title to the bed of navigable water below the OHWM as it existed at the time the State was admitted into the Union." *Id.* at 3. In *Bowman v. McGoldrick Lumber Co.*, 219 P. 1063 (Idaho 1923), the court, in determining the rights of a littoral landowner, expressly recognized state title to the bed of Coeur d'Alene Lake. *Id.* at 1065.

Although the above decisions addressed situations arising outside the Coeur d'Alene Reservation, they affirmed state title to Coeur d'Alene Lake generally, making no distinction between Reservation and non-Reservation lands. The Idaho Supreme Court has also explicitly affirmed state title to submerged lands within the Reservation. *West v. Smith*, 511 P.2d 1326 (Idaho 1973), was an action by a littoral land owner to compel removal of a houseboat moored to pilings driven into the bed of Coeur d'Alene Lake. The littoral property was located within the exterior boundaries of the Coeur d'Alene Reservation, as was the lakebed.[8] The Idaho Supreme Court adopted

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[8] The legal description of the littoral property was Government Lot 3, Section 2, Township 47 North, Range 4 W, Boise Meridian. *West*, 511 P.2d at 1328. The land was described as "abut[ting] the westerly shore of Lake Coeur d'Alene." *Id.* The described land lies within the exterior boundaries of the Reservation, and the adjacent lakebed lies plainly within that portion of the lakebed that was adjudicated in the decisions that are the subject of this petition.

the district court's finding that the "houseboat and the pilings to which it is moored are located below the natural high water mark of the lake on lands belonging to the State of Idaho." *Id.* at 1329. In adopting the district court's finding, the court reiterated that "[t]he State of Idaho holds title to the beds of all navigable bodies of water below the natural high water mark for the use and benefit of the whole people." *Id.* at 1330. As authority, the court cited the equal footing language in the Idaho Admission Bill and this Court's decision in *Shively v. Bowlby*, 152 U.S. 1 (1894). *Id.* at 1330 n.1. The court also affirmed that "[s]ubject to regulation by the State, the public is entitled to use the waters of Lake Coeur d'Alene for navigational and recreational purposes." *Id.* at 1331.

It is impossible to reconcile the court of appeals' decision, which recognizes federal and tribal ownership of the lower third of Coeur d'Alene Lake, with the *West* decision, which expressly recognized State ownership and regulation of that same portion of the Lake. The court of appeals' decision also conflicts with the State's exercise, over the last 100 years, of legislative and judicial jurisdiction over Coeur d'Alene Lake and the St. Joe River, based on the assumption of State ownership. The Court should grant the petition for certiorari and resolve this conflict.

3. The court of appeals' decision presents irreconcilable conflicts with decisions of this Court.

In addition to the demonstrated conflicts with the decisions of the Idaho Supreme Court, the court of appeals' decision conflicts directly with this Court's decision in *United States v. Alaska*, 521 U.S. 1 (1997). The *Alaska* decision established an analysis for determining

whether Congress intended to defeat state title to submerged lands previously reserved by executive order. While conflicts between this Court and a circuit court of appeals are not normally fertile ground for review on certiorari, there are unique circumstances to this case which mandate such review. First, States within the Ninth Circuit are, by virtue of their large number of reservations and their later admission to the Union, placed in the particular circumstance of having to assert and defend claims to submerged lands within federal reservations. A large number of these reservations were created by executive orders issued during the territorial period. Thus, due to geographic and historical circumstances, challenges to state title to submerged lands within executive order reservations have, to date, been peculiar to the States within the Ninth Circuit. *See, e.g., Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251 (9th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984) (addressing submerged lands within executive order addition to treaty reservation); *Muckleshoot Indian Tribe v. Trans-Canada Enterprises*, 713 F.2d 455 (9th Cir. 1983), *cert. denied*, 466 U.S. 1049 (1984) (addressing submerged lands within executive order expansion of treaty reservation); *United States v. Aranson*, 696 F.2d 654 (9th Cir. 1983), *cert. denied*, 464 U.S. 982 (1983) (addressing submerged lands within executive order addition to statutory reservation); *United States v. Alaska*, 423 F.2d 764 (9th Cir.), *cert. denied*, 400 U.S. 967 (1970) (addressing submerged lands within wildlife refuge created by executive order); *Skokomish Indian Tribe v. France*, 320 F.2d 205 (9th Cir. 1963), *cert. denied*, 376 U.S. 943 (1964) (addressing submerged lands within executive order reservation); *Moore v. United States*, 157 F.2d 760

(1946), *cert. denied*, 330 U.S. 827 (1947) (addressing submerged lands within executive order reservation). Outside of the Ninth Circuit, state title to submerged lands within executive order reservations apparently has not been challenged. Thus, conflicts with other circuits may never appear, and an issue critical to the sovereignty of many western States may escape review.

Another unique circumstance is that the primary conflict alleged herein is between the decision below and a decision issued by this Court while exercising its *original* jurisdiction, *United States v. Alaska*, 521 U.S. 1 (1997). In many ways, the situation is analogous to a conflict between circuits. When exercising its original jurisdiction, the Supreme Court is in much the same posture as a circuit court of appeals, since its review is only one step removed from the fact-finding of the special master typically appointed to hear original jurisdiction cases. Thus, decisions in original jurisdiction cases tend to be more dependent on factual findings than is typical of decisions heard on certiorari, which have been distilled through an additional layer of appellate review before being heard by the Supreme Court. By nature, original jurisdiction decisions are not intended to provide national guidance or establish rules of general applicability.

The concept that original jurisdiction decisions tend to be fact-specific and of narrow applicability is certainly demonstrated by the *Alaska* decision, which was based on circumstances and provisions unique to the Alaska Statehood Act. Without careful attention to its details, attempts to apply the *Alaska* decision to other circumstances may result in the misconception that the Court lowered the thresholds that must be met to infer congressional intent to defeat state title to submerged lands. Indeed, when extended to circumstances outside the

unique context of the Alaska Statehood Act, as happened here, much of the language of the *Alaska* decision can be readily misapplied. As described in further detail below, the court of appeals' misapplication of the holdings in *Alaska* creates a series of conflicts that should be resolved through the granting of the petition for certiorari.

4. The court of appeals' decision conflicts with this Court's decisions holding that Congress must affirmatively intend to defeat state title to submerged lands within federal reservations.

The court of appeals focused on one particular fact to support its holding: the fact that after being informed that the Coeur d'Alene Reservation included navigable waters, Congress authorized negotiations to secure the release of some or all of the waters from the Reservation. The court of appeals concluded that:

> Congress' course of conduct in ascertaining in 1888 that the Executive construed the reservation to include submerged lands and then authorizing negotiations in 1889 to purchase and thereby recover whatever portion of those lands the Tribe was willing to sell demonstrates its acknowledgement that beneficial ownership of the lands had passed to the Tribe.
>
> . . . .
>
> Although Congress had the opportunity and the power to repudiate the executive reservation, and the 1887 agreement, it did not do so. Instead, in 1889 it took affirmative action, choosing to authorize negotiations – with few limitations aside from an instruction to acquire non-agricultural lands – "for the purchase *and release* by said tribe of such portions of *its reservation* . . . as such tribe *shall consent to sell*" (emphasis added). Act of March 2, 1889, 25 Stat.

> 980, 1002. The express reference to the reservation as *the Tribe's reservation*, explicit recognition that the choice to sell was the Tribe's, and reference to *tribal release* of portions of *its reservation* all manifest an awareness and acceptance by Congress of the boundaries of the 1873 reservation – boundaries that included submerged lands.

App. 21-22 (footnote excluded).

The court of appeals' conclusions conflict with this Court's decision in *Alaska* in a number of ways. First, it ignores this Court's requirement that Congress must act affirmatively to defeat state title to submerged lands. *Utah Div. of State Lands v. United States*, 482 U.S. 193, 202 (1987) (United States must "establish that Congress affirmatively intended to defeat the future State's title to [submerged] land"); *Alaska*, 521 U.S. at 41 (adopting *Utah* standard). An affirmative intent to defeat state title to submerged lands within federal reservations requires that Congress make plain its intent that federal ownership would continue *after* statehood. In *Alaska*, this Court was careful to find that in regards to both reservations at issue, Congress clearly contemplated that its action would defeat state title and result in continued federal ownership after statehood. *See* 521 U.S. at 42 ("Section 11(b) [of the Statehood Act] thus reflects a clear congressional statement that the United States owned and would continue to own submerged lands included within the Reserve"); *id.* at 57 ("In § 6(e) of the Statehood Act, Congress clearly contemplated continued federal ownership of certain submerged lands . . . . ").

In *Alaska*, Congress' intent to retain title to submerged lands after statehood was explicit, because the retention of submerged lands occurred in the context of a statehood act, and more specifically, the Alaska Statehood

Act, which is unique in that one of its primary purposes was to allocate ownership of public lands between the state and federal governments. *See Alaska*, 521 U.S. at 1916 (noting that § 6(e) of Alaska Statehood Act transferred certain lands to Alaska and retained certain lands in federal ownership); *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 549-50 (1987) (discussing the "allocation" of public lands in the Alaska Statehood Act and follow-up statutes). The Act's express allocation of reserved lands that clearly included navigable waters allowed this Court to conclude that "Congress clearly contemplated continued federal ownership of certain submerged lands . . . . " *Alaska*, 521 U.S. at 57.

The court of appeals, however, failed to recognize that the retention of federal ownership of submerged lands in a pre-statehood act does not necessarily imply an intent for such ownership to continue after statehood. In contrast to the Alaska Statehood Act, the act at issue here was not intended to allocate public lands between federal and state ownership. Rather, it simply directed negotiations to modify the Reservation boundaries prior to congressional approval of the pending agreement. While Congress was clearly motivated by a desire to secure the immediate release of at least some of the Lake from its status as "Indian country," there is nothing in the legislative history to suggest that it affirmatively intended that the remainder of the Lake would not later pass into State ownership. Indeed, the court of appeals made no finding that Congress "clearly contemplated" continued federal ownership of submerged lands after statehood, nor could it. The court of appeals simply ignored this Court's requirement that Congress must specifically contemplate the defeat of state title. Defeats of state title cannot be

inadvertent. The petition for a writ of certiorari should be granted to resolve this conflict.

5. The court of appeals' decision conflicts with this Court's decisions holding that a defeat of state title to submerged lands within a reservation should not be inferred unless continued federal ownership after statehood is necessary to achieve the purposes of the reservation.

In determining whether Congress intended to defeat state title to submerged lands within the Coeur d'Alene Reservation, the court of appeals expressly declined to examine the purpose of the reservation as understood by Congress. The court stated:

> The State's argument that the district court should have determined the purpose of the reservation as understood by Congress (rather than the Executive), and as so understood in 1889 (rather than 1873) lacks support in the case law. . . . What mattered was that Congress recognized that the executive reservation included submerged lands, not that it knew or acknowledged the executive purpose in reserving them.

App. 18.

The court of appeals' holding was a radical departure from this Court's approach in the *Alaska* decision, where the Court stressed the need to examine the purpose of the reservation as an indication of whether Congress concluded that defeat of state title was necessary to meet federal objectives. In *Alaska*, the Court found that that the purpose of the petroleum reserve was to retain federal ownership of all "oil and gas deposits within the Reserve's boundaries," 521 U.S. at 39, and that "transfer of submerged lands at statehood – and the loss of ownership rights to the oil deposits beneath those lands –

would have thwarted that purpose." *Id.* at 43. Addressing the wildlife range, the Court found that "waters within the boundaries of the Range were an essential part of the habitats of the species the Range was designed to protect, and that retention of lands underlying those waters was critical to the Government's goal of preserving these aquatic habitats." *Id.* at 52. The Court also distinguished prior decisions, such as that in *Utah Div. of State Lands*, finding that in *Utah* continued federal ownership of Utah Lake after statehood was not necessary for fulfillment of the federal goal of developing a reservoir. *Id.* at 38. Likewise, the Court noted that "[i]n *Montana* [*v. United States*], we reasoned that a conveyance of a beneficial interest in submerged lands beneath a river on the Crow Reservation would not have been necessary to achieve the Government's purpose in creating the reservation, because fishing was not important to the Crow Tribe's way of life." *Id.* at 52.

Clearly, the *Alaska* Court examined the purpose of the reserves at issue as a method of determining *congressional* intent. 521 U.S. at 42-43 (discussing purposes of oil reserve as aid to interpretation of § 11(b) of the Statehood Act); *id.* at 56-57 (noting that the operative provision in § 6(e) of Statehood Act stated an express purpose of reserving lands for the "protection of wildlife"). Indeed, it could not be otherwise. Since the defeat of state title is an issue determined by congressional intent, the reviewing court must examine the objectives of the reservation as understood and defined by Congress. Thus, the analysis adopted in *Alaska* hinged on determining the objective of the reservation and finding that "defeating state title to submerged lands was necessary to achieve the United States' objective . . . . " *Id.* at 42.

Here, however, the court of appeals declined to determine Congress' understanding of the Reservation's purposes. Rather, it relied solely on the purposes of the Reservation as understood by the government agents whose actions precipitated the 1873 executive order. App. 17-19.[9] The court of appeals' approach cannot be reconciled with the *Alaska* decision. It is folly to assume that Congress, in approving a reservation, automatically adopts as its own the objectives of the executive, especially when the executive order establishing the reservation occurred many years before, and where, as here, the executive order was intended to be only temporary in nature. App. 35. It is especially folly in this instance, because Congress did not, prior to statehood, approve the Reservation as established by the prior Executive order. Instead, it purposefully withheld such approval, and directed the modification of the Reservation boundaries to exclude at least some of the submerged lands.

Congress' directive to modify the Reservation was plainly due to the fact that the original objectives which led to the inclusion of submerged lands were no longer valid. Both Congress and the Commissioner of Indian Affairs found that the living conditions of the Coeur

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[9] Notably, both the court of appeals and the district court looked only to the purpose of the reservation as understood "by the government's negotiators and agents," App. 19, not the purpose as understood by the persons actually involved in the decision to set aside the Reservation such as the President, the Secretary of the Interior, and the Commissioner of Indian Affairs. Indeed, the district court expressly rejected any need to determine the knowledge or understanding of the three primary decision-makers. App. 58, n.13. The result was that the court's determination of the purpose of the Reservation was even further removed from the objective of determining congressional intent.

d'Alene Tribe in 1889 had changed, as demonstrated in the 1888 Senate Resolution, which pointedly noted "the Indians now on such reservation are located in the extreme southwest corner of the same around De Smedt Mission, near the town of Farmington, in Washington Territory, where the land is good for agriculture . . . . " S. Misc. Doc. No. 36, 50th Cong., 1st Sess. (1888). In his response to the resolution, the Commissioner of Indian Affairs stated that in addressing the question of ownership of the Lake, "it [is] proper to refer briefly to the character and condition of the Indians occupying the reservation and the situation of affairs as existing amongst them." S. Ex. Doc. No. 76, 50th Cong., 1st Sess. 5 (1888). He then went on to describe the Tribe's agricultural successes. *Id.* After reviewing the Tribe's needs, the Commissioner concluded that "my own opinion is that the reservation might be materially diminished without detriment to the Indians, and that changes could be made in the boundaries for the release of some or all of the navigable waters therefrom, which would be of very great benefit to the public . . . . " *Id.* at 6.

Obviously, in the views of both Congress and the Commissioner of Indian Affairs, the Tribe's needs had changed since the Reservation's establishment in 1873, and such views were a critical factor in Congress' decision to negotiate modifications in the boundaries of the Reservation. It was anticipated that the primary purpose of the diminished reservation would be to provide for the Tribe's needs as an agricultural people. It was not happenstance that the sole directive in the 1889 Act authorizing new negotiations was that the executive branch seek "the purchase and release by said tribe of such portions of its reservation not agricultural and valuable chiefly for

minerals and timber . . . . " Act of March 2, 1889, 25 Stat. 980 at 1002.

Congress' contemplation that the primary purpose of the diminished reservation would be to provide an agricultural land base for the Tribe was certainly a relevant factor to be considered. *See Montana v. United States*, 450 U.S. 544, 556 (1981) (finding that Congress had no need to depart from the policy of retaining submerged lands within Indian reservation for future States where fishing "was not important to [the tribe's] diet or way of life"). The obvious inference to be made from Congress' contemplation of the purposes of the Coeur d'Alene Reservation is that Congress did not, by authorizing negotiations with the Tribe, contemplate the need to defeat future state title to submerged lands to supply the needs of the Tribe. By ignoring this critical evidence of congressional intent, the court of appeals ignored the directive of this Court that the purpose of the reservation is a critical factor in determining whether Congress intended federal ownership of submerged lands to continue after statehood. *Alaska*, 521 U.S. at 39. The Court should grant certiorari to resolve this conflict.

6. The court of appeals' decision ignores the fact that Congress purposefully deferred its ratification of the Reservation until after statehood.

The court of appeals concluded that "[f]ormal ratification, prior to statehood, of the 1887 and 1889 agreements is not necessary for a finding of congressional intent to defeat state title." App. 20. Whatever truth this may have as a general statement, it ignores congressional intent relating specifically to the Coeur d'Alene Reservation. Congress itself had indicated, in express and specific

language, that the boundaries of the Coeur d'Alene Reservation would not be deemed as ratified or approved by Congress until Congress took specific and express action to do so.

The saga of congressional ratification began with the 1886 Act authorizing negotiations to extinguish the Tribe's claims of aboriginal title outside the 1873 Reservation. The authorization act provided that "no agreement made shall take effect until ratified by Congress." Act of May 15, 1886, 24 Stat. 29 at 44. Thus, the process began with Congress clearly reserving to itself the right to review the executive branch's actions and to hold those actions in abeyance until formally ratified.[10]

Congress' caution was well warranted. Article 5 of the 1887 Agreement provided that

> In consideration of the foregoing cession and agreements, it is agreed that the Coeur d'Alene Reservation shall be held forever as Indian land and as homes for the Coeur d'Alene Indians . . . and no part of said reservation shall ever be sold, occupied, open to white settlement, or otherwise disposed of without the consent of the Indians residing on said reservation."

App. 89. Congressional ratification of this provision would have represented a significant change in the status of the Reservation, since at the time "the rights and interests which the Indians enjoyed in executive order reservations were different from and less than their rights

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[10] In accordance with Congress' directions, the negotiators of the 1887 Agreement included a provision mirroring the language in the authorization act. Article 14 of the 1887 Agreement stated that: "This agreement shall not be binding upon either party until ratified by Congress." App. 92.

and interests in treaty or statute reservations. *Sioux Tribe of Indians v. United States*, 316 U.S. 317, 327 (1942).

Armed with the knowledge that its ratification would permanently alter and strengthen the Tribe's title to lands within the Reservation, Congress, upon being informed by the Commissioner of Indian Affairs that the Reservation included navigable waters, expressly withheld its ratification of the 1887 Agreement until the issue could be resolved to the satisfaction of Congress. The House Committee on Indian Affairs reported that:

> The 1887 Agreement was presented to the Fiftieth Congress, but not ratified for sundry reasons, among which was a desire on the part of the United States to acquire an additional area, to wit, a certain valuable portion of the reservation specifically dedicated to the exclusive use of said Indians under an Executive order of 1873 . . . [that] contains a magnificent sheet of water, the Coeur d'Alene Lake, and its chief tributary, to wit, the Coeur d'Alene River, over the waters of which steamers now ply daily . . . .

H.R. Rep. No. 1109, 51st Cong., 1st Sess. 4 (1890).

In lieu of ratification, Congress directed further cession negotiations with the Tribe. The object of these negotiations "was to regain from the Tribe whatever submerged lands it was willing to sell." App. 22, n.14. Once again, Congress directed that any agreement reached with the Tribe would be of no effect until ratified by Congress. The 1889 Act authorizing negotiations for the cession of a portion of the 1873 Reservation provided that the "purchase shall not be complete until ratified by Congress." Act of March 2, 1889, 25 Stat. at 1002. This language is also reflected in Article 4 of the 1889 Agreement, which provides that:

> It is further agreed and understood that this agreement shall not be binding on either party until the former agreement now existing between the United States by the duly-appointed commissioners and the said Coeur d'Alene tribe of Indians, bearing date March twenty-sixth, eighteen hundred and eighty-seven, shall be duly ratified by Congress; and in the event of the ratification of the aforesaid agreement of March twenty-sixth, eighteen hundred and eighty-seven, then this agreement to be and remain in full force and effect but not binding on either party until ratified by Congress.

App. 95.

Congress itself defined the circumstances under which it would ratify and approve the boundaries of the Coeur d'Alene Reservation, while clearly signaling that its authorization of negotiations should not be deemed as approval of the Reservation. Indeed, the House Committee on Indian Affairs reported that Congress refused to ratify the 1887 Agreement for the very reason that its boundaries embraced navigable waters. H.R. Rep. No. 1109, 51st Cong., 1st Sess. 4 (1890). Yet, the court of appeals interpreted the 1889 authorization act as ratifying the 1873 boundaries so as to include the same navigable waters that were the reason for the express withholding of ratification. Such an interpretation cannot be squared with the objectives underlying the 1889 act, and conflicts with this Court's repeated directive that Congress must act "affirmatively" to defeat state title to submerged lands. The petition for certiorari should be granted to resolve this conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 2000

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, In re suit to quiet title to that portion of the bed and banks of Coeur d'Alene Lake and the St. Joe River lying within the exterior boundaries of the 1873 Coeur d'Alene Reservation, *Plaintiff-counter-defendant, Appellee* v. STATE OF IDAHO, *Defendant-counter-claimant, Appellant-Cross-Appellee,* v. COEUR D'ALENE TRIBE OF IDAHO, *Plaintiff-intervenor, Appellee-Cross-Appellant*	Nos. 98-35831 98-35847 D.C. No. CV-94-00328-EIL OPINION

Appeals from the United States District Court
for the District of Idaho
Edward J. Lodge, District Judge, Presiding

Argued and Submitted
December 9, 1999 – Seattle, Washington

Filed May 2, 2000

Before: Thomas M. Reavley,[1] Stephen Reinhardt, and M. Margaret McKeown, Circuit Judges.

COUNSEL

Steven W. Strack, Deputy Attorney General, Natural Resources Division, Boise, Idaho, for defendant-counter-claimant, appellant-cross-appellee State of Idaho.

Hank Meshorer, United States Department of Justice, Environmental and Natural Resources Division, Washington, D.C., for plaintiff-counter-defendant, appellee United States of America.

Raymond C. Givens, Brian J. Cleary, Givens, Funke & Work, Coeur d'Alene, Idaho, for plaintiff-intervenor, appellee-cross-appellant Coeur d'Alene Tribe of Idaho.

OPINION

McKEOWN, Circuit Judge:

At issue in this case is the ownership of submerged lands lying within the present-day boundaries of the Coeur d'Alene Indian Reservation, which was originally set aside by executive order in 1873. After a nine-day trial involving multiple expert and lay witnesses, extensive written reports, scientific studies, and historical documents, the district court issued a lengthy and meticulous

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[1] The Honorable Thomas M. Reavley, Senior United States Circuit Judge for the United States Court of Appeals, Fifth Circuit, sitting by designation.

decision in which it concluded that the United States retained these submerged lands for the benefit of the Coeur d'Alene Indian Tribe (the "Tribe"). The court thus entered an order quieting title to the beds and banks of the Coeur d'Alene Lake (the "Lake") and the St. Joe River[2] (collectively, the "submerged lands") in favor of the United States, as trustee, and the Tribe, as the beneficially interested party of the trusteeship. The State of Idaho (the "State") appeals that order along with related orders giving the Tribe exclusive right to these submerged lands. We affirm the judgment of the district court. Congress's course of conduct in the late 1880s – in the years immediately preceding Idaho's statehood in 1890 – demonstrates that it intended to defeat the State's title to submerged lands within the 1873 reservation.

The Tribe cross-appeals the district court's refusal to adjudicate the ownership of other submerged lands located within what is now Heyburn State Park (the "Park"). These lands were part of the Tribe's reservation until 1911, when the United States conveyed them to Idaho to establish a park. We affirm the court's decision with respect to the Park because the complaint, read as a whole, excludes lands within the Park and the United States expressly disclaimed any intent to quiet title to such lands.

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[2] Referred to in certain historical documents as the St. Joseph River.

BACKGROUND

The district court's extensive Memorandum Decision and Order lays out the general historical backdrop to this case as well as extensive findings of fact. The State has not challenged the district court's factual findings, nor has it challenged the court's conclusion that executive actions reflect a clear intent to include the submerged lands within the 1873 reservation.[3] We thus discuss the factual background only as it relates to the main issue in this case, namely, whether Congress intended to defeat the State's title to these submerged lands.

In 1867, more than thirty years before Idaho became a state, a reservation embracing at best a small portion of the Lake was established by executive order. The Tribe was not even aware of this order until after it sent a petition in 1871 to the Commissioner of Indian Affairs (the "Commissioner") requesting a charter for a reservation. Thereafter, the Tribe refused to settle within the confines of the 1867 reservation because it did not include the Tribe's mission or waterways. After learning of the 1867 executive order, the Tribe sent a second petition, in 1872, to the Commissioner, requesting inclusion of the mission and the St. Joe and Coeur d'Alene river valleys. The Tribe's request was based in part on its continuing dependence on water resources; as it noted in its petition, "for a while yet we need have some hunting and fishing."

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[3] For purposes of this appeal, the State concedes that the 1873 executive order was intended to reserve title to the submerged lands for the benefit of the Tribe.

Congress responded in 1873 by authorizing a commission to negotiate with the Tribe for settlement on a reservation. After negotiations, the Tribe agreed to settle within an area considerably larger than the 1867 reservation. The new boundaries included the Coeur d'Alene and St. Joe Rivers as well as the vast majority of the Lake (the "1873 reservation"). An executive order, dated November 8, 1873,[4] set aside this area for the Tribe pending ratification of the 1873 agreement, which was contingent on congressional approval, but such approval never came. All subsequent executive and congressional action taken with regard to the reservation nonetheless operated from the understanding that its boundaries were as stated in the 1873 agreement and executive order.[5]

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[4] Executive Orders Relating to Indian Reservations, From May 14, 1855 to July 1, 1912, Washington, D.C., Government Printing Office (1912) at 72.

[5] For instance, an 1883 government survey located the reservation's northern boundary across the Lake, consistent with the 1873 agreement and executive order; the Executive dealt with both commercial and recreational use of the Lake by non-Indians on the assumption that the laws governing Indian territory governed; Congress spoke of the 1873 reservation as "set apart for the use of the Coeur d'Alene Indians by executive order" and described its borders in an 1888 act granting a railroad a conditional right-of-way through the reservation, Act of May 18, 1888, 25 Stat. 160; Congress referenced the 1873 boundaries in its 1886 authorization of negotiations "for the cession of their lands outside the limits of the present Coeur d'Alene reservation," Act of May 15, 1886, 24 Stat. 29, 44; and Congress again referenced the 1873 boundaries in its 1889 authorization of negotiations "for the purchase and release by said tribe of such portions of its reservation not agricultural and valuable chiefly for minerals and timber as such tribe shall consent to sell. . . . " Act of March 2, 1889, 25 Stat. 980, 1002.

In 1885, spurred by concerns due to increasing white settlement pressure, the Tribe again contacted the Commissioner, requesting confirmation of the 1873 reservation and compensation for lands outside that reservation but within the Tribe's aboriginal territory. Congress responded in 1886 by authorizing negotiations with the Tribe "for the cession of their lands outside the limits of the present Coeur d'Alene reservation." Act of May 15, 1886, 24 Stat. 29, 44. Negotiations were undertaken in 1887, and the Tribe agreed to cede its aboriginal title "to all lands in said Territories and elsewhere, except the portion of land within the boundaries of their present reservation in the Territory of Idaho, known as the Coeur d'Alene Reservation" (the "1887 agreement"). Act of March 3, 1891, 26 Stat. 989, 1027 (reciting 1887 agreement). This agreement, like the 1873 agreement, required ratification.

While the 1887 agreement was pending before Congress, pressure to open up at least part of the reservation to the public (particularly the Lake), prompted the Senate to pass a resolution in 1888 inquiring of the Secretary of the Interior about the boundaries of the Tribe's reservation and "whether such area includes any portion, and if so, about how much of the navigable waters of Lake Coeur d'Alene, and of Coeur d'Alene and St. Joseph Rivers." S. Res. Mis. Doc. No. 36, 50th Cong. (1888). The Senate also sought advice about "whether it is advisable to release any of the navigable waters aforesaid from the limits of such reservation." *Id.* Two weeks later, the Secretary replied, stating that the 1873 reservation included the submerged lands at issue and attaching a report by the Commissioner; this report informed Congress that

"the reservation appears to embrace all the navigable waters of Lake Coeur d'Alene, except a very small fragment cut off by the north boundary of the reservation" and that portions of the Coeur d'Alene and St. Joseph Rivers flowed through the reservation. Letter from the Secretary of the Interior, S. Ex. Doc. No. 76 at 3, 50th Cong. (1888). The Commissioner opined that "changes could be made in the boundaries for the release of some or all of the navigable waters" and that it would be "an easy matter" to negotiate a cession of the reservation, "including all or a portion of the navigable waters," once the 1887 agreement had been ratified. *Id.* at 2.

After receiving this response, Congress authorized a third round of negotiations, this time "for the purchase and release by said tribe of such portions of its reservation not agricultural and valuable chiefly for minerals and timber as such tribe shall consent to sell. . . . " Act of March 2, 1889, 25 Stat. 980, 1002. Following negotiations, the Tribe agreed to cede the approximate northern third of its 1873 reservation to the United States; this area included roughly the northern two-thirds of the Lake (the "1889 agreement").[6] Act of March 3, 1891, 26 Stat. 989, 1030 (reciting 1889 agreement). The 1889 agreement, like

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[6] The Tribe's chief insisted on carefully defining the new proposed boundaries, rejecting the suggestion that the "lake belongs to [the Tribe] as well as to the whites." Message from the President of the United States, S. Ex. Doc. No. 14, 51st Cong. (1889), at 9. A government negotiator then explained the proposed boundaries as follows: "[I]f we buy this land you still have the St. Joseph River and the lower part of the lake and all the meadow and agricultural land along the St. Joseph River." *Id.*

the 1873 and 1887 agreements, required ratification, and, as a condition, the Tribe insisted that the 1887 agreement be ratified. The map submitted to Congress along with the written terms of the agreement showed the boundary of the reservation as bisecting the Lake from west to east at its southern third.

Congress formally ratified both the 1887 and 1889 agreements, but not until 1891, Act of March 3, 1891, 26 Stat. 989, nine months after Idaho's admission to the Union. Idaho Admission Bill, Act of July 3, 1890, 26 Stat. 215. This statehood act also "accepted, ratified, and confirmed" the Idaho constitution, *id.* § 1, which disclaims the State's "right and title to . . . all lands lying within said limits owned or held by any Indians or Indian tribes." IDAHO CONST. art. XXI, § 19.

Prior to Idaho's admission, the House introduced and the Senate passed separate but identical bills[7] ratifying the 1887 and 1889 agreements, but due to uncertainty in the House over whether the bills were the same, the House tabled the Senate bill pending investigation of this question, 21 CONG. REC. 5905 (1890), which was ultimately resolved in the affirmative, H.R. REP. NO. 2988, 51st Cong., at 1 (1890). Two House reports, which recommended passage of the bill, *see id.* and H.R. REP. NO. 1109, 51st Cong., at 5 (1890),[8] and which indicate recognition of the submerged lands as part of the Tribe's reservation at

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[7] H.R. 7703, 51st Cong. (1890); S. 2828, 51st Cong. (1890), 21 CONG. REC. 5769 (1890).

[8] H.R. REP. NO. 2988 contains a reprint of H.R. REP. NO. 1109.

the time of statehood, further explained that the 1887 agreement had not been ratified when first presented

> for sundry reasons, among which was a desire on the part of the United States to acquire an additional area, to wit, a certain valuable portion of the reservation specifically dedicated to the exclusive use of said Indians under an Executive order of 1873 . . . [that] contains a magnificent sheet of water, the Coeur d'Alene Lake, and its chief tributary, to wit, the Coeur d'Alene River, over the waters of which steamers now ply daily. . . . It also controls the outlet of said lake, to wit, the Spokane River.

H.R. REP. NO. 1109, at 4, *reprinted in* H.R. REP. NO. 2988, at 5.

Today, the boundaries of the reservation remain as established in the 1887 and 1889 agreements, with two exceptions: 1) the Harrison cession (negotiated by agreement in 1894), a strip of land running from the mouth of the Coeur d'Alene River to the reservation's eastern boundary and including a defined chunk of the Lake; and 2) the Park, an area transferred to Idaho by Congress in 1911 and embracing three smaller lakes adjacent to the southern end of the Lake.

The United States, seeking to quiet title to submerged lands within the present-day reservation, initiated this action in its own capacity and as trustee for the Tribe. The district court granted the Tribe's motion to intervene, subject to the limitation that the suit would encompass only those submerged lands put at issue by the parties' pleadings. The court declined the Tribe's request that it

adjudicate the ownership of submerged lands within the Park.

Following trial, the district court ruled in favor of the United States and the Tribe on the quiet title action. The court found that the submerged lands lay within the boundaries of the present-day reservation, that in 1873 the Tribe depended on the Lake and associated rivers for a significant portion of its fishing needs, and that in 1873 the federal government was aware of this dependence. The court then concluded that the Executive intended to reserve submerged lands within the 1873 reservation for the benefit of the Tribe. The State has challenged neither these factual findings nor the court's legal conclusion on executive intent.

The court also found that Congress was on notice, prior to Idaho statehood, that the Executive had reserved the submerged lands within the 1873 reservation for the benefit of the Tribe; that the "northern boundary line of the diminished reservation was drawn [in the 1889 agreement] so as to bisect the Lake"; and that the minutes of the 1889 negotiations showed that this placement was "for the purpose of establishing the Tribe's right to the Lake and rivers." Looking at events between 1873, after the executive order established the reservation within which the Tribe had agreed to settle, and 1890, the year Idaho entered the Union, the court concluded that Congress ratified the 1873 executive reservation of submerged lands. The court explained that "[b]y explicitly recognizing, prior to Idaho's statehood, an Executive reservation that included submerged lands, Congress demonstrated a clear intent to defeat the State's equal footing

title." It is this conclusion that the State challenges on appeal.

ANALYSIS

We review de novo the district court's interpretation of treaties, statutes, and executive orders. *See Confederated Tribes of Chehalis Indian Reservation v. Washington*, 96 F.3d 334, 340 (9th Cir. 1996); *United States v. Washington*, 157 F.3d 630, 642 (9th Cir. 1998) (meaning of treaty language is question of law, reviewed de novo). Findings of historical fact, including the district court's findings regarding treaty negotiators' intentions, are reviewed for clear error. *See United States v. Washington*, 157 F.3d at 642. Because the State does not appear to have challenged any of the court's underlying factual findings, we accept the facts as given and note that they are amply supported by the record.

Juxtaposed in this case are two principles, both of which must be accorded due weight: the canon of construction favoring Indians and the presumption under the Equal Footing Doctrine that a State gains title to submerged lands within its borders upon admission to the Union. *See Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1257 (9th Cir. 1983) (stating that, "when faced with a claim [to submerged lands] by an Indian tribe . . . , we must accord appropriate weight to both the principle of construction favoring Indians and the presumption that the United States will not ordinarily convey title" to such lands).

The Supreme Court's trilogy of decisions in *United States v. Alaska*, 521 U.S. 1 (1997), *Utah Division of State*

Lands v. United States, 482 U.S. 193 (1987), and *Montana v. United States*, 450 U.S. 544 (1981), provides the framework for analyzing whether a state's presumptive title to submerged lands within its borders has been defeated. In *Alaska*, the Supreme Court reaffirmed the two-prong test set forth in *Montana* and *Utah* for determining whether a state's presumptive equal footing title to submerged lands within its borders has been defeated. As framed by the Supreme Court, the question before us is "whether the United States intended to include submerged lands within the [reservation] and to defeat [Idaho's] title to those lands." *See Alaska*, 521 U.S. at 36.

Although executive action has now been held sufficient to establish the first prong, the second prong requires a showing of congressional intent. *See Alaska*, 521 U.S. at 40-41, 44. Nothing in *Alaska* requires that congressional action take the form of explicit congressional ratification of an agreement reserving or conveying title to particular submerged lands. Rather, the Supreme Court has framed the question as whether Congress intended to defeat the state's title to the lands at issue, *see id.* at 36; *Utah*, 482 U.S. at 202; notably, the Supreme Court has not required that the requisite intent be established in any specific, formulaic way, focusing instead on whether the congressional action at issue showed an affirmative intent to defeat state title, that is, whether the "intention was definitely declared or otherwise made very plain." *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926). As the Court in *Alaska* pointed out in rejecting the state's argument to the contrary:

> [T]here would have been no barrier to Congress retaining a petroleum reserve, including submerged lands, at the point of Alaska's statehood, provided it satisfied *Utah['s]* . . . requirements of demonstrating a clear intent to include submerged lands within the Reserve's scope and a clear intent to defeat Alaska's title. It follows that Congress could achieve the same result by explicitly recognizing, at the point of Alaska's statehood, an executive reservation that clearly included submerged lands.

Alaska, 521 U.S. at 44.

Given the State's concession, for purposes of this appeal, that the 1873 executive order was intended to convey or reserve title to submerged lands, we focus on the second prong – whether Congress demonstrated an intent to defeat the State's title to the submerged lands. We conclude that Congress's actions prior to statehood clearly indicate its acknowledgment, express recognition, and acceptance of the executive reservation, thereby establishing its intent to defeat the State's title. Accordingly, we affirm the district court's ruling quieting title to submerged lands within the present-day Coeur d'Alene Reservation for the benefit of the Tribe. In light of our decision, we need not reach the Tribe's alternative arguments for affirmance.

I. The State's Appeal – Submerged Lands

Relying on the events leading up to and surrounding the 1889 negotiations, the district court held that Congress demonstrated a clear intent to defeat the State's equal footing title. In particular, the court found that

Congress was on notice that the executive reservation included submerged lands and that its 1889 authorization of negotiations with the Tribe for a cession of tribal property constituted recognition and validation of the executive reservation. Idaho argues that none of the events leading up to its statehood in 1890 constitute affirmative ratification of the executive intent to convey or reserve the submerged lands and thus cannot show congressional intent to defeat state title to these lands.

In any submerged lands/equal footing case, a court must begin with a strong presumption against defeat of a state's title. *See Alaska*, 521 U.S. at 34. The Supreme Court has emphasized, however, that the question of whether title to submerged lands rests with a state is "ultimately a matter of federal intent." *Id.* at 36.

In *Alaska* itself, the Court held that the United States reserved title to the submerged lands within a petroleum reserve created by executive order 35 years prior to Alaska's statehood, *see id.* at 32-46, and to submerged lands within a wildlife refuge set aside by agency action (via an application and regulations) prior to statehood but not approved until after statehood, *see id.* at 46-61. In finding that the United States intended to include submerged lands within these reserved areas and to defeat state title to the lands, the Court emphasized that: 1) the reserves' boundaries were drawn so as necessarily to include the submerged lands, *see id.* at 36, 51; 2) the purpose of the reserves would have been defeated had the lands not been included, *see id.* at 39, 51-52; and 3) Congress included language in the Alaska Statehood Act indicating that it retained Enclave Clause authority to the petroleum reserve, *see id.* at 41-42, and title to lands

withdrawn or otherwise set aside as refuges for the protection of wildlife, *see id.* at 55-56.

In this case, several similar factors counsel the same result.[9] First, in both 1873 and 1889, the boundaries of the reservation were drawn so as necessarily to include submerged lands. Second, the purpose of the reservation would have been defeated had it not included these lands. Third – and this is the crux of the case – the series of congressional actions taken in the late 1880s (ascertaining that the Executive construed the reservation to include submerged lands and authorizing negotiations to recover whatever portion of the lands the Tribe was willing to sell) shows that Congress acknowledged that beneficial ownership of the lands had already passed to the

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[9] We recognize that, in *Alaska*, the Supreme Court discussed the first two factors identified here – namely, the purpose of the reserves and the fact that their boundaries were drawn so as necessarily to include submerged lands – mainly with respect to whether the United States intended to include the submerged lands within the reserves. These factors likewise support a finding of executive intent to include in this case, as the State concedes for purposes of appeal. We also discuss these factors with respect to the "intent to defeat" prong for two reasons. First, the State argued that *Alaska* involved a "unique combination of necessity, purpose, and explicit statutory language" and also argued that the district court short-circuited the "purpose" analysis by "failing to determine Congress' [s] understanding of the purpose of the Reservation at the time of the alleged ratification of the 1873 Executive order." Second, under the circumstances of this case, Congress's knowledge of the scope of the executive reservation – in particular, the boundaries of the reservation and the fact that they included submerged lands – is crucial. Accordingly, it is helpful to outline precisely what information Congress had before it.

Tribe. Congress's post-statehood actions also reflect recognition and confirmation of the passage of submerged lands to the Tribe. Both before and after statehood, Congress affirmatively treated the submerged lands as reserved for the Tribe.

We begin with the manner in which the boundaries of the reservation were determined. The reservation, which physically encompassed the submerged lands at issue, was created by a pre-statehood, 1873 executive order that drew the boundaries so as necessarily to include submerged lands. Crucial to the Tribe's acceptance of the 1873 reservation, as the district court found and the State does not dispute, was the inclusion of submerged lands. In addition, and significantly, when the 1873 boundaries were renegotiated in 1889, the "northern boundary line of the diminished reservation was drawn so as to bisect the Lake" specifically "for the purpose of establishing the Tribe's right to the Lake and rivers." The State likewise does not dispute this factual finding.

Both the Tribe and the agents sent out at the behest of Congress in 1889 understood the reservation to encompass submerged lands. As noted, the reservation's boundaries were redrawn by the 1889 agreement to split the lake – a fact recognized in the legal descriptions of the cession, the verbal explanation given to the Tribe,[10] and the maps submitted to Congress. As we recognized in

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[10] After the Tribe specifically rejected the suggestion that the "lake belongs to [it] as well as to the whites," a government negotiator told the Tribe that it "would still have the St. Joseph River and the lower part of the lake. . . . "

another case in which we upheld tribal claims to submerged lands under the half of a lake within the borders of a reservation, "[i]t would have been pointless, and quite likely deceptive, to have the northern boundary of the reservation bisect Flathead Lake unless it was intended to convey title to the southern half of that lake to the Indians." *Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951, 962 (9th Cir. 1982) (further noting that "the most natural and intelligible way of understanding the boundary description is to infer an intent to convey the southern lake bed" and adopting this interpretation "in view of the Supreme Court's very frequent admonitions that doubtful language in Indian treaties must be construed in favor of the Indians and given the sense the Indians would have understood it to convey"). This observation is equally pertinent here, where the natural reading of all available documentation points to a purposeful division of the Lake.

Considering together the district court's undisputed factual findings, the canon favoring Indians, and the fact that both the 1873 and 1889 agreements drew boundary lines *across* the lake – an unusual practice, as the district court pointed out – the executive reservation and subsequent renegotiation could only have been meant and understood to convey title to submerged lands within the reservation's borders.

This conclusion finds further support in the fact that the purpose of the reservation would have been defeated had it not included submerged lands. As the district court found, and as the State does not challenge, the Tribe was dependent on its fisheries in 1873. The Tribe successfully insisted, both in 1873 and 1889, upon a reservation drawn

to include submerged lands. In 1873, the reservation was expanded from its 1867 borders because the Tribe refused to settle on lands that did not encompass the Lake and its associated waterways. In 1889, the borders of the reservation were contracted and redrawn – but redrawn so as to ensure that the Tribe still had beneficial ownership of the southern third of the Lake as well as the portion of the St. Joe River within the 1873 reservation.

The State's argument that the district court should have determined the purpose of the reservation as understood by Congress (rather than the Executive), and as so understood in 1889 (rather than 1873) lacks support in the case law. In *Alaska*, where the Supreme Court relied heavily on the purpose of the reserves at issue, the Court did not require either that Congress itself apprehend the purpose or that the purpose be extant at the time of congressional action. *See Alaska*, 521 U.S. at 39, 51-52. The Court examined the purpose of the petroleum reserve, for instance, with regard to the government's goal in 1923, when the Executive reserved the lands, rather than by reference to 35 years later when Congress passed the statehood act referencing its authority over the reserve. *See id.* at 39, 41-42. What mattered was that Congress recognized that the executive reservation included submerged lands, not that it knew or acknowledged the executive purpose in reserving them.[11] *See id.* at 44

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[11] Even cases specifically addressing tribal claims of right to submerged lands do not require that Congress apprehend the purpose of the reservation at the time it takes action recognizing the executive reservation. Rather, they focus on what the "United States" or the "government" knew as of the initial reservation. *See, e.g., United States v. Aam*, 887 F.2d 190, 195, 197

(providing for a showing that title to submerged lands does not pass to a state where Congress "explicitly recogniz[ed], at the point of . . . statehood, an executive reservation that clearly included submerged lands"). Thus, it is irrelevant that Congress may have believed the Tribe to have wholly or mainly converted to an agricultural lifestyle by 1889. Here there is no dispute that the government's negotiators and agents were aware of the Tribe's dependence on fishing in 1873. Indeed, even Congress was specifically on notice of this dependence as a result of the Tribe's second, 1872 petition. What matters, however, is Congress's awareness that the 1873 reservation included submerged lands, an issue about which there can be no doubt given the response to the 1888 resolution.

Turning now to the actions Congress took with respect to the reservation in the late 1880s, we conclude that this series of actions demonstrates acknowledgment,

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(9th Cir. 1990) (stating that "where courts have reviewed tribal claims of beneficial title to land under navigable waters, the inquiry focused on the circumstances surrounding the creation of the reservation" and noting "insufficient proof that the United States [by its officials or agents] perceived that the tribe depended on those particular tidelands"); *Muckleshoot Indian Tribe v. Trans-Canada Enterprises, Ltd.*, 713 F.2d 455, 458 (9th Cir. 1983) (stating that "the United States was clearly aware that the focus of the Muckleshoot's world was on the rivers along which they lived"; that "[t]he Government knew, at least by the date of the 1874 Executive Order expanding the Muckleshoot Reservation, that the Indians depended on watercourses"; and that "[t]he Government's Indian agents understood that [t]he capture of fish was an essential source of [the Indians'] food supply") (internal quotations omitted); *Puyallup Indian Tribe*, 717 F.2d at 1258 (noting "the Government's awareness of the importance of the water resource to the Tribe").

recognition, and acceptance of the boundaries of the 1873 reservation, which Congress knew the Executive had construed to include submerged lands, thereby showing the requisite intent to defeat state title.

Formal ratification, prior to statehood, of the 1887 and 1889 agreements is not necessary for a finding of congressional intent to defeat state title.[12] Neither the

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[12] Nor is inclusion of language in a statehood act – here the Idaho Admission Bill – specifying congressional intent to defeat state title necessary to a finding that Congress did, in fact, intend to defeat a state's title to particular submerged lands. In *Alaska*, the Supreme Court looked to the Alaska Statehood Act as a source of congressional intent in concluding that Congress intended to defeat Alaska's title to the petroleum reserve and wildlife refuge. *See Alaska*, 521 U.S. at 41-42, 55-56. Statehood acts, however, do not – and have never been held to – serve as exclusive sources of congressional intent with respect to the question of congressional intent to defeat state title.

We also note that there is significantly more evidence of congressional intent with regard to the submerged lands in this case than with regard to the wildlife refuge in *Alaska*. The Supreme Court found clear intent to defeat Alaska's title to the submerged lands within this wildlife refuge as a result of a fairly general provision of the Alaska Statehood Act. Under that provision, the United States retained "lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife." *Id.* at 47, 55. Not only had the refuge in *Alaska* not yet been approved at the time of statehood – an administrative application for withdrawal of the lands in the proposed refuge was still pending when Congress passed the statehood act and when Alaska subsequently entered the Union – but Congress took no action either prior to or at statehood specifically with regard to the refuge at issue. By contrast, in this case, before statehood, Congress was often and actively involved in deciding the fate of the submerged lands within the Tribe's reservation.

Supreme Court nor any of our cases require such a showing. Rather, the test is whether Congress clearly intended to defeat the State's title to submerged lands. Here, Congress's course of conduct in ascertaining in 1888 that the Executive construed the reservation to include submerged lands and then authorizing negotiations in 1889 to purchase and thereby recover whatever portion of those lands the Tribe was willing to sell demonstrates its acknowledgment that beneficial ownership of the lands had passed to the Tribe.

As the district court found, when Congress authorized these negotiations, it was clearly on notice that the 1873 executive reservation included submerged lands within its confines.[13] Congress also had the unratified 1887 agreement before it, an agreement that referenced the Tribe's "present [1873] reservation in the Territory of Idaho, known as the Coeur d'Alene Reservation" and that secured the cession, pursuant to Congress's 1886 authorization, of aboriginal lands "outside the limits of the present [1873] Coeur d'Alene reservation."

Although Congress had the opportunity and the power to repudiate the executive reservation and the 1887 agreement, it did not do so. Instead, in 1889 it took affirmative action, choosing to authorize negotiations –

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[13] Similarly, Congress's 1888 passage of an act granting a railroad a right-of-way through the reservation, identified as "set apart for the use of the Coeur d'Alene Indians by executive order, commonly known as the Coeur d'Alene Reservation," and conditioned on the Tribe's consent, also supports congressional recognition of the 1873 reservation, which Congress by this point knew included submerged lands.

with few limitations aside from an instruction to acquire non-agricultural lands[14] – "for the purchase *and release* by said tribe of such portions of *its reservation* . . . as such tribe *shall consent to sell*" (emphasis added). Act of March 2, 1889, 25 Stat. 980, 1002. The express reference to the reservation as *the Tribe's reservation*, explicit recognition that the choice to sell was the Tribe's, and reference to *tribal release* of portions of *its reservation* all manifest an awareness and acceptance by Congress of the boundaries of the 1873 reservation – boundaries that included submerged lands. This series of events indicates that Congress accepted the Secretary's advice to leave any cession up to negotiations. Indeed, the fact that Congress decided to make its authorization open-ended reinforces the district court's conclusion that Congress recognized and accepted the Tribe's beneficial ownership of all lands – including submerged lands – within the 1873 reservation; it also shows Congress's recognition of the uncertainty of

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[14] The events surrounding the authorization clearly show that the main purpose of the new negotiations was to regain from the Tribe whatever submerged lands it was willing to sell. The State itself notes that "as the district court recognized, the 1889 . . . Act was an authorization 'to negotiate with the Tribe of a release of the submerged lands' " (quoting district court decision). Relevant events include the 1888 resolution; the response to that resolution; the events leading up to the resolution, such as the pressure, brought to Congress's attention, to open up the Lake; the negotiations themselves, which focused heavily on boundaries as they affected submerged lands; and a subsequent report from the Department of the Interior, which noted that little agricultural land had been acquired. *See* Message from the President, S. Ex. Doc. No. 14, at 2.

regaining any land at all, and its particular desire to recover whatever submerged lands it could.

In short, Congress "otherwise made very plain," *Holt State Bank*, 270 U.S. at 55, its intention regarding the submerged lands. With the 1887 agreement and the response to the 1888 resolution before it, Congress, fully aware of the boundaries of the 1873 reservation and the extent of the submerged lands that were within it, sought to modify the boundaries described in the agreement – and it sought to do so via purchase rather than the simpler expedient of rejecting the executive reservation. Although Congress may have been unhappy to learn that the executive reservation included submerged lands, its actions show recognition and acceptance of the passage of beneficial ownership to the Tribe, for it sought to *regain* as much submerged land as possible. The affirmative course of action on which Congress embarked in 1889 – open-ended negotiations to purchase whatever non-agricultural land, particularly submerged lands, the Tribe was willing to cede – presupposes that beneficial ownership of all land within the 1873 reservation, including submerged lands, had already passed to the Tribe.

To the extent that the State argues that reversal is necessary because the district court erred in relying on the disclaimer clause in the Idaho constitution,[15] we reject this challenge. We do not read the district court's brief

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[15] This clause, found in article XXI, § 19, of the Idaho constitution, reads: ". . . . And the people of Idaho do agree and declare that we forever disclaim all right and title . . . to all lands lying within said limits owned or held by any Indians or Indian tribes[.]"

discussion of this clause as integral to its ruling. Nor, for that matter, do we believe reliance on the clause is necessary to affirm the judgment quieting title to submerged lands within the present-day reservation. To the extent the clause is considered at all, however, it weighs in favor of the conclusion we have reached, for it disclaims title to land "held by" Indians. The lands in question were held by the Tribe, and Congress affirmed this provision when it ratified the Idaho constitution.[16]

We also note that although Congress has never undertaken by general laws to dispose of submerged lands, this case involves much more than a simple disclaimer clause or a general reference in the Idaho Admission Bill to accepting, ratifying, or confirming the Idaho constitution. Congress was heavily involved in deciding the fate of the submerged lands set aside for the Tribe's

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[16] That such a disclaimer clause may be declaratory, conferring no new right or power on the United States, is immaterial. The substance of a declaratory clause is not meaningless, even if the clause itself is unnecessary in that it merely recognizes a preexisting interest. *See United States v. Gardner*, 107 F.3d 1314, 1320 (9th Cir. 1997) (finding constitutional clause disclaiming title to unappropriated public lands and explaining that although the U.S. "did not need the disclaimer clause to gain title to the public lands in Nevada," such a declaratory clause of a preexisting U.S. right to administer its property is valid).

We also reject as inapplicable to this case the State's argument that Congress cannot require states to disclaim rights of sovereignty as the price of admission to the Union. Congress did not do so here. All Congress did was to acknowledge and ratify, through its course of conduct, the executive reservation of certain submerged lands for the benefit of the Tribe.

benefit by executive order. Congress treated the submerged lands as beneficially owned by the Tribe – to the point of authorizing negotiations for cession of whatever portion of the Tribe's submerged lands it was willing to sell. The State's citation to *Alaska v. Ahtna, Inc.*, 891 F.2d 1401 (9th Cir. 1989), is not instructive. There a provision in the Alaska constitution disclaiming all right and title to property that "may be held" by or in trust for natives stood alone, with no prior or specific congressional action referencing the submerged lands at issue, *see id.* at 1405-06; in addition, the executive conveyance in *Ahtna* did not occur until well after Alaska's statehood. *See id.* at 1403.

Finally, we note that in addition to the series of congressional actions prior to Idaho's statehood, Congress's post-statehood actions also reflect recognition and confirmation that submerged lands had passed to the Tribe prior to Idaho's statehood. Although these post-statehood events are not in themselves demonstrative of pre-statehood intent, nor are they central to our decision, neither can they be wholly ignored.[17]

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[17] Although the State suggests that post-statehood events may not be considered in assessing congressional intent, we are aware of no rule forbidding consideration of such events. Indeed, the case law may suggest the contrary. *See Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89-90 (1918) (finding support for conclusion that Congress intended to include submerged lands within reservation in subsequent conduct whereby reservation was treated as including submerged lands). *Cf. Aam*, 887 F.2d at 194 (district court did not abuse its discretion in finding that matters occurring after Washington's admission in 1889 were too remote to be probative of the intent of the parties to an 1855 treaty or of the Secretary's intent upon

Among these events, the most notable is the 1894 Harrison cession, which was ratified just five years after the 1889 authorization to negotiate. The United States negotiated with the Tribe for the cession of a narrow strip of land extending from the Lake to the eastern boundary of the reservation. During the negotiations, the parties referred to the 1889 agreement as having created a boundary line in relation to the Lake, and they explicitly included a corner of the Lake in the cession. A cession that included a portion of the lake bed would not have been necessary absent a contemporary understanding that the Tribe had beneficial ownership of the bed. Moreover, as was the case with the 1889 agreement, the map submitted to Congress depicted the cession as including part of the bed, literally creating a right angle in the water. This post-statehood acknowledgment of tribal ownership of the lake bed is further confirmation, or reaffirmation, of the status of the submerged lands within the reservation. It is tantamount to a memorialization of prior events, especially given that nothing occurred between statehood and the negotiations for the Harrison cession that altered the ownership situation. Just as Congress would not have negotiated with the Tribe for land the Tribe did not own, so too the United States, on behalf of the Tribe, would not have ceded to the State land that the State already owned.

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enlargement of the reservation in 1864). Notably, *Aam* does not set forth any general rule barring post-statehood evidence, and it is also readily distinguishable, for the substantial time gap – 40 years – motivating the *Aam* decision is not present here.

The same can be said for the course of events leading to the creation of the Park. In 1908, Congress withdrew from allotment, for use as a park, a portion of the reservation embracing three smaller lakes adjacent to the southern end of the Lake, and in 1911 it formally transferred this area to the State. There would have been no need for the United States to withdraw the lands comprising the Park from the reservation and no need for the United States to convey these lands by patent to the State if the State already owned them. We thus have another significant example of the contemporary understanding of all parties concerned with regard to the Tribe's beneficial ownership of submerged lands within its reservation.

II. The Tribe's Cross-Appeal – Heyburn State Park

The cross-appeal raises the question of whether the district court erred in refusing to decide ownership of submerged lands within the Park. We must decide whether the parties' pleadings[18] – specifically, the United States' complaint and the State's counterclaim – put at issue submerged lands within the Park. Resolution of this question requires a careful and commonsense reading of the pleadings. We reject the cross-appeal because the

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[18] In construing the parties' pleadings, we bear in mind that the current physical situation in and around the Park differs from the situation that existed in 1873, at the time of the executive reservation, and in 1908 and 1911, the years, respectively, that the Park was authorized and conveyed to the State. Due to the construction of a dam, three small lakes have combined with the Lake into one large body of water. We read the United States' complaint in light of the physical situation as it existed prior to the construction of the dam.

complaint, read as a whole, does not include lands within the Park and the United States disavowed any intent to quiet title to submerged lands within the Park. Further, the relief the State seeks in its counterclaim largely mimics the United States' prayer for relief, and the State has likewise disclaimed any intent to litigate issues beyond those raised in the United States' complaint. Accordingly, we conclude that the district court properly declined to adjudicate the ownership of these submerged lands.

Neither the complaint nor the counterclaim put submerged lands within the Park at issue. The complaint, taken as a whole, is most naturally read to exclude these lands. First, it specifically identifies the lands that comprise the Park as having been "withdr[awn] from allotment" and "reserved" by the United States. It then juxtaposes these lands, along with other lands that the Tribe ceded to the United States, with lands identified as "still remaining within the Coeur d'Alene 1873 Reservation." The implication is that the United States sought to exclude any lands within the Park from the ambit of the complaint. In addition, the complaint's prayer for relief repeatedly makes reference to the "approximate southern one-third of Coeur d'Alene Lake as well as those portions of the beds and banks of the St. Joe River located within the 1873 Coeur d'Alene Indian Reservation." That the complaint references a specific part of the Lake and the St. Joe River while mentioning none of the three lakes that were the subject of the conveyance to the State strongly suggests that the United States sought to exclude the Park from this quiet title action.

Our reading of the complaint is supported by the conduct of the United States throughout this litigation. Significantly, the United States has pursued this action, both in the district court and on appeal, only as to submerged lands within the present-day boundaries of the reservation. Indeed, at the district court level, the United States expressly disavowed any claim to submerged lands within the Park. Under these circumstances, we will not read the more general language in the complaint's caption and preliminary statement, which refer to portions of the Lake and St. Joe River within the exterior boundaries of the 1873 reservation, as extending to submerged lands within the Park.

We also reject the Tribe's argument that the State itself put submerged lands within the Park at issue via a counterclaim in which it asserted that it was "entitled to a judgment . . . quieting its title to the beds and banks of those portions of Lake Coeur d'Alene and the St. Joe River located within Heyburn State Park."[19] Although the counterclaim incorporates the allegations in an affirmative defense claiming title to "all lands within" the Park, the State's prayer for relief largely mimics the United States' prayer, which is far narrower than the affirmative defense. In its prayer for relief, the State seeks to quiet title to "those portions of Lake Coeur d'Alene and the St. Joe River within the present boundaries of the Coeur

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[19] The State's answer included two sections referencing the Park: 1) an affirmative defense in which the State claimed title to "all lands within Heyburn State Park as a result of . . . federal actions" authorizing the Park and conveying its lands to the State by patent; and 2) the above-quoted counterclaim. Only the counterclaim is at issue.

d'Alene Reservation and Heyburn State Park." Notably, and in contrast to its affirmative defense, the State does not name in its prayer for relief any of the three lakes originally embraced by the Park, and it has consistently disclaimed any attempt to litigate any issue beyond that raised in the United States' complaint.

Because the United States disavowed any claim to submerged lands within the Park, the State disavowed intent to litigate any issue beyond that raised by the United States, and a fair reading of the relief requested in both the complaint and counterclaim does not, under the circumstances, encompass lands within the Park, the district court properly declined to adjudicate the ownership of submerged lands within the Park.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

In re suit to quiet title to that portion of the bed and banks of the Coeur D'Alene Lake and St. Joe River lying within the exterior boundaries of the-1873 Coeur D'Alene Reservation	
UNITED STATES OF AMERICA, Plaintiff-Counterdefendant, and COEUR D'ALENE TRIBE, Plaintiff in Intervention Counterdefendant in Intervention, vs. STATE OF IDAHO, Defendant.	Case No. CV 94-328-N-EJL **MEMORANDUM DECISION AND ORDER** (Jul. 28, 1998)

I. Introduction

This case involves a dispute over the ownership of the bed and banks of Coeur d'Alene Lake and the St. Joe River (the "submerged lands") lying within the exterior boundaries of the present-day Coeur d'Alene Indian Reservation. The United States of America acting in its own capacity and as trustee for the Coeur d'Alene Tribe of Idaho (the "Tribe") initiated the current action against the

State of Idaho seeking to quiet title to the submerged lands for the benefit of the Tribe and its members. In addition to its title claim, the United States prays for a declaratory judgment to establish the Tribe's exclusive use, occupancy and right to the quiet enjoyment of the submerged lands. Finally, the United States seeks a permanent injunction prohibiting the State from asserting any right, title or other interest to such lands.

By leave of the Court, the Tribe intervened to assert independently its beneficial interest in the submerged lands based on the theory of "recognized title" and, alternatively, to claim ownership to the same lands pursuant to unextinguished "aboriginal or Indian title." The State answered and counterclaimed, requesting that the title of the submerged lands be quieted in favor of Idaho. The matter was then tried before the Court without a jury. The Court's decision is set forth below and constitutes its findings of fact and conclusions of law.

II. Historical Background

The Tribe once inhabited more than 3.5 million acres in what is now northern Idaho and northeastern Washington. On June 14, 1867, President Andrew Johnson established by Executive Order a reservation for the Tribe. The 1867 reservation consisted for the most part of an area known as Hangman Valley,[1] lying to the southwest of Coeur d'Alene Lake (the "Lake"). The parties

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[1] The area known as Hangman Valley also is referred to in various exhibits as Hangman Creek Valley or Latah Valley or Paradise Valley or Palouse Valley.

dispute whether the 1867 reservation included any portion of the submerged lands within its exterior boundaries but, at most, the reservation embraced only a small sliver of the Lake. The precise boundaries of the 1867 reservation never were established by survey, and the Tribe never formally accepted the reservation as its own.

On July 1, 1873, the Commissioner of Indian Affairs directed a three member Commission to visit non-treaty tribes in Idaho, including the Coeur d'Alenes, for the purpose of inducing the tribes "to abandon their roaming habits and consent to confine themselves within the limits of such reservation or reservations as may be designated for their occupancy." Ex. 309 at 1; Ex. 234 at 17, 385. As the result of negotiations between the Commission and the Tribe, an agreement was reached which entitled the Tribe to a reservation of approximately 598,000 acres and compensation for the relinquishment of all claims to the remainder of its aboriginal lands.

The reservation boundaries established by the 1873 agreement embraced the Hangman Valley, the Coeur d'Alene River (from its mouth to the Coeur d'Alene Mission of the Sacred Heart[2]), the St. Joe River (from its mouth to the present site of St. Maries), and all but a small portion of the Lake. As such, the 1873 reservation included within its boundaries not only the area set aside by the 1867 Executive Order but also the Lake and other waterways as well as additional tracts of land. The 1873

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[2] The Coeur d'Alene Mission of the Sacred Heart is popularly known today as the Cataldo Mission. Historically, it also has been called the Sacred Heart Mission or the Old Coeur d'Alene Mission.

agreement, however, required approval by Congress before it became binding on the parties.

In a letter dated November 4, 1873, the Commissioner of Indian Affairs advised the Secretary of Interior of the 1873 agreement and recommended that "pending the action of Congress upon said agreement . . . the President . . . issue an Executive Order setting apart the same for the use of said Indians." Ex. 3240. On November 8, 1873, President Ulysses S. Grant established by Executive Order a reservation for the Tribe that mirrored exactly the legal boundaries delineated in the 1873 agreement:

> It is hereby ordered that the following tract of country in the Territory of Idaho be, and the same is hereby, withdrawn from sale and set apart as a reservation for the Coeur d'Alene Indians in said Territory, viz:
>
> Beginning at a point on the top of the dividing ridge between Pine and Latah (Hangmans) Creeks, directly south of a point on said last-named creek 6 miles above the point where the trail from Lewiston to Spokane Bridge crosses said creek; thence in a northeasterly direction in a direct line to the Coeur d'Alene Mission on the Coeur d'Alene River (but not to include the lands of said mission); thence in a westerly direction in a direct line to the point where the Spokane River heads in or leaves the Coeur d'Alene Lakes; thence down along the center of the channel of said Spokane River to the dividing line between the Territories of Idaho and Washington as established by the act of Congress organizing a Territorial government for the Territory of Idaho; thence south along said

> dividing line to the top of the dividing ridge between Pine and Latah (or Hangmans) Creeks; thence along the top of said ridge to the place of beginning.

Ex. 275 at 72. Although a purpose of the Executive Order was to temporarily set aside the reservation "pending the action of Congress," the 1873 agreement never was ratified by Congress.

The United States conducted a survey of the reservation in 1883. Once the boundaries had been established, Congress sought to extinguish the Tribe's aboriginal title to lands outside the reservation. In 1886, Congress authorized the Secretary of the Interior to negotiate with the Tribe "for the cession of their lands outside the limits of the present Coeur d'Alene reservation." Ex. 649. In 1887, the Tribe and representatives of the United States reached an agreement in which the Tribe ceded

> all right, title, and claim which they now have, or ever had, to all lands in said Territories and elsewhere, except the portion of land within the boundaries of their present reservation in the Territory of Idaho, known as the Coeur d'Alene Reservation.

Ex. 215 at 68. The 1887 agreement provided that it "shall not be binding on either party until ratified by Congress." *Id.* at 69.

Before it had ratified the 1887 agreement, Congress authorized the Secretary of the Interior "to negotiate with the Coeur d'Alene tribe of Indians for the purchase and release by said tribe of such portions of its reservation not agricultural and valuable chiefly for minerals and timber as such tribe shall consent to sell." Ex. 2288 at 1002. The

resulting negotiations lead [sic] to an agreement in 1889, in which the Tribe ceded the approximate northern third of the 1873 reservation to the United States. The portion of the reservation subject to the 1889 cession included within its boundaries the approximate northern two-thirds of the Lake. The 1889 agreement provided that it was "not binding on either party until ratified by Congress." Ex. 215 at 14.

Prior to congressional ratification of the 1887 and 1889 agreements, Idaho was admitted into the Union. As part of that process, Congress enacted the Idaho Statehood Act, which "accepted, ratified, and confirmed" the Idaho State Constitution. Ex. 221 at 215. The state constitution contains a section disclaiming the State's "right and title to the unappropriated public lands" and lands "owned or held by any Indians or Indian tribes." Ex. 2294 at 415. Shortly after Idaho secured statehood, Congress, on March 3, 1891, ratified the 1887 and 1889 agreements.

With two exceptions, the boundaries of the Coeur d'Alene Reservation remain the same today as established by the congressional ratification of the 1887 and 1889 agreements. In 1894, the Tribe agreed to cede to the United States a one-mile wide strip of the reservation, running from the mouth of the Coeur d'Alene River to the reservation's eastern boundary (the "Harrison cession"). And in 1908, Congress authorized the conveyance to the State of Idaho of land surrounding three small lakes, adjacent to the southern extreme of the Lake. Following its transfer by patent to the State of Idaho in 1911, this area became a public park ("Heyburn State Park").

III. Legal Framework

The United States and the Tribe (collectively, "the Plaintiffs") allege that the Executive Order of 1873 setting apart the reservation also reserved for the benefit of the Tribe the bed and banks of the Lake and other navigable waterways lying within the outer boundaries of the reservation. According to the Plaintiffs, Congress intended to retain, for the benefit of the Tribe, title to the submerged lands included within the reservation created by the 1887 and 1889 agreements.[3] In contrast, the State maintains that under the "equal footing" doctrine title to all submerged lands within the exterior boundaries of the 1873 reservation passed to the State of Idaho on July 3, 1890, when Idaho was admitted into the Union.

The United States Supreme Court recently articulated the legal principles relevant to resolving a dispute over the ownership of submerged lands. In *United States v. Alaska*, 117 S. Ct. 1888 (1997), the Supreme Court emphasized the critical connection between the ownership of submerged lands and a State's sovereignty: "Ownership of submerged lands – which carries with it the power to control navigation, fishing, and other public uses of water – is an essential attribute of sovereignty." *Id.* at 1892; *see also Idaho v. Coeur d'Alene Tribe of Idaho*, 117 S. Ct. 2028, 2041-42 (1997). For this reason, and in order to maintain an "equal footing" with the original 13 colonies, a State is presumed upon admission to the Union to "succeed to

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[3] The United States' claims are specifically limited to the submerged lands included within the exterior boundaries of the present-day Coeur d'Alene Reservation. The Court by prior order denied the Tribe's request to broaden the quiet title action.

the United States' title to the beds of navigable waters within [its] boundaries." *Alaska*, 117 S. Ct. at 1892. Accordingly, " '[a] court deciding a question of title to the bed of navigable water must . . . begin with a strong presumption' against defeat of a State's title." *Id.* at 1906 (quoting *Montana v. United States*, 450 U.S. 544, 552 (1981)).

Under the Constitution, however, the Federal Government can defeat a future State's title to land underlying navigable waters. The Property Clause, Art. IV, § 3, cl. 2, provides Congress with the power to dispose of submerged lands in pre-statehood territories by "granting submerged lands to private parties" or by reserving "submerged lands under federal control." *Id.* The congressional exercise of this power will not offend the Constitution so long as the conveyance or reservation is for "an appropriate public purpose." *Id.* at 1909. In this case, there is no doubt that the United States' alleged retention of the submerged lands for the benefit of the Tribe would serve an appropriate public purpose. *See id.* at 1907. The issue instead is whether the Federal Government in fact acted to reserve the disputed submerged lands.

In this regard, the question of "[w]hether title to submerged lands rests with a State . . . is ultimately a matter of federal intent." *Id.* In the least difficult case, the Federal Government's intent to defeat the future State's title is made clear by "an express reference to the bed beneath the waters . . . in the grants establishing the reservation." *United States v. Aranson*, 696 F.2d 654, 664 (9th Cir.) (citing *Montana*, 450 U.S. at 552), *cert. denied*, 464 U.S. 982 (1983). When the pertinent documents do not

make express reference to the bed and banks, a conveyance or reservation may be implied but a court "will not infer an intent to defeat a future State's title to inland submerged lands 'unless the intention was definitely declared or otherwise made very plain.' " *Alaska*, 117 S. Ct. at 1906 (quoting *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926)). Thus, the intent of the Federal Government to retain submerged lands may be demonstrated by an express statement or may be inferred from relevant evidence.

In a case such as this one, where it is alleged that the submerged lands were included within an Executive reservation, the inquiry as to federal intent involves three distinct questions. First, whether the actions of the Executive reflected a clear intent to include submerged lands within the reservation. *See id.* at 1907-09. Second, whether Congress authorized the Executive retention of the submerged lands or ratified the same. *See id.* at 1910-11. Third, and finally, whether Congress intended to defeat the future State's title to those lands. *See id.* at 1909-10. Evidence that bears directly on the resolution of these three questions includes (1) the language of the relevant documents, (2) the location of the reservation boundaries in relation to the submerged lands, and (3) the purpose of the reservation. *See, e.g., id.* at 1908. In contrast, evidence consisting solely of "the 'mere fact that the bed of a navigable water lies within the boundaries' " of a reservation will not overcome the presumption against defeat of a State's title. *Id.* at 1907 (quoting *Montana*, 450 U.S. at 554).

Special evidentiary considerations apply when it is alleged that an Executive reservation implements an

agreement between the United States and a tribe. Specifically, Ninth Circuit cases have formulated a three-part test that bears on the first inquiry under *Alaska* as to whether the Executive intended to include submerged lands within the reservation. In an effort to give effect to the "principle of construction resolving any ambiguities in agreements with the United States in favor of the Indian tribes," Ninth Circuit decisions have allowed a plaintiff to establish federal intent on this issue by showing (1) the reservation included "within its boundaries a navigable water," (2) the tribe depended on the watercourse for a significant portion of the tribe's needs; and (3) the "Government was plainly aware of the vital importance of the submerged lands and the water resource to the tribe at the time of the [reservation]."[4] *Muckleshoot Indian Tribe v. Trans-Canada Enter., Ltd.*, 713 F.2d 455, 457 (9th Cir. 1983) (quoting *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1258 (9th Cir.1983), *cert. denied*, 465 U.S. 1049 (1984)), *cert. denied*, 465 U.S. 1049 (1984); *see also United States v. Aam*, 887 F.2d 190, 194, 196-97 (9th Cir. 1989). *But see United States v. Pend Oreille Pub. Util. Dist. No. 1*, 926 F.2d 1502, 1510-11 (9th Cir.) (holding that tribal dependence upon a river and the United States' awareness of dependence is not enough to establish federal intent to retain submerged lands for benefit of tribe), *cert. denied*, 502 U.S. 956 (1991).

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[4] The Ninth Circuit has noted more than once that by articulating the three-part test it did not "mean to imply that only where these conditions are met is a conclusion that the United States granted the bed of a navigable water to an Indian tribe justified." *Muckleshoot Indian Tribe*, 713 F.2d at 458 n.2.

Even if successful in satisfying the three-part test, and therefore demonstrating the Executive intent to reserve submerged lands, the plaintiff also must show that Congress authorized or ratified the Executive reservation and that Congress intended to defeat the future State's title to the submerged lands. *See Alaska*, 117 S. Ct. at 1909-11; *Utah Div. of State Lands v. United States*, 482 U.S. 193, 202 (1987). The necessity of establishing congressional awareness and approval of an Executive decision to reserve submerged lands rests on the relationship between the "equal footing" doctrine and the allocation of federal power under the Constitution. The power of the Federal Government to defeat a future State's equal footing title resides ultimately with Congress.[5] *See, e.g., Alaska*, 117 S. Ct. at 1906, 1910-11 (stating that pursuant to the Property Clause Congress can reserve submerged lands under federal control); *Utah Div. of State Lands*, 482 U.S. at 200-01 (explaining that the power to defeat a future State's title to submerged lands arises out of Congress' power under the Property Clause).

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[5] In the *Muckleshoot* and *Puyallup* cases the Ninth Circuit panels assumed that once the plaintiff demonstrated an Executive intent to include submerged lands within the reservation the ownership issue had been resolved. *See Muckleshoot Indian Tribe*, 713 F.2d at 457-458; *Puyallup Indian Tribe*, 717 F.2d at 1260-61 & n.10. Subsequent Supreme Court cases have shown this to be an erroneous assumption. *See, e.g., Alaska*, 117 S. Ct. at 1906, 1910-11; *Utah Div. of State Lands*, 482 U.S. at 200-02.

IV. Findings of Fact and Conclusion of Law

During a trial lasting nine days, the parties to this action presented evidence on the pertinent legal issues in the form of expert and lay testimony, written reports, scientific studies and historical documents. Having heard and/or reviewed all of the evidence, the Court sets forth its findings of fact and conclusions of law.

A. Executive Actions Reflect a Clear Intent to Include the Submerged Lands Within the 1873 Reservation.

Applying the three-part test developed by the Ninth Circuit in *Puyallup Indian Tribe*, 717 F.2d at 1258, to the trial evidence, the Court finds that the first question under *Alaska* – whether the Executive intended to reserve the submerged lands – must be answered in the affirmative.

1. The reservation includes within its boundaries land under navigable waters.

The parties agree that the disputed submerged lands lie within the exterior boundaries of the present-day Coeur d'Alene Reservation. Similarly, the State does not contest the fact that the Lake and associated waterways are navigable bodies of water. After considering the evidence presented at trial, the Court finds that the Lake and the relevant portions of the Coeur d'Alene, St. Joe and Spokane Rivers were at all times navigable watercourses and that the Coeur d'Alene Reservation includes within its boundaries the disputed submerged lands. Test. of

Hart, Tr. at 282-89; Test. of Fahey, Tr. at 1027-30, 1034; Ex. 209 at 47; Ex. 1319 at 1-4; Ex. 2310; Ex. 2313.

2. The Tribe depended on the Lake and associated waterways for a significant portion of the Tribe's needs.

The Coeur d'Alene Indians have occupied the area adjacent to the Lake and the Coeur d'Alene, St. Joe and Spokane Rivers since time immemorial. The Tribe traditionally survived by fishing, hunting and gathering. For the reasons set forth below, the Court finds the Lake and associated waterways were essential to the Tribe's traditional lifestyle.

Historically, the Coeur d'Alene Indians lived in a number of villages located around the Lake and along the rivers. The Tribe consumed resident trout and whitefish year-round.[6]

The resident fishery was a main staple of the Tribe's diet. Among other methods of fishing, the Coeur d'Alenes constructed fish traps and weirs which were anchored in the bed and banks of the watercourses. In some cases these structures were extensive, spanning the width of a river. Surplus fish were sometimes dried for

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[6] Spokane Falls, on the Spokane River, prevented salmon and other anadromous fish from migrating upstream into the Coeur d'Alene drainage system. However, a salmon run did reach upper Hangman Creek. Tribal members also sometimes harvested salmon outside the Tribe's aboriginal territory. But the total contribution to the Tribe's diet was minimal; it is estimated the Coeur d'Alenes obtained less than 5 percent of their total caloric intake from salmon. Ex. 1435 at 18.

later use or traded to other tribes. Occasionally, tribal members also harvested crayfish and freshwater mussels. Test. of Hart, Tr. at 43-73; Hart Report (Ex. 1437) at 5-28; Test. of Sprague, Tr. at 745-763, 765-69, 785; Sprague Report (Ex. 2404) at 31-33; Ex. 33 at 132-33, 148; Ex. 64 at 7; Ex. 115 at 38-41; Ex. 132 at 17-18; Ex. 133 at 37-38; Ex. 137 at 175-76; Ex. 139 at 10; Ex. 145 at 130-33; Ex. 171 at 38-40, 55, 88, 94-95, 105-07; Ex. 2030 at 104-16; Ex. 2272.

The Lake and associated rivers were commonly used to facilitate hunting activities. During communal hunts, deer were driven into a waterway and large numbers, sometimes hundreds, were killed by tribal members waiting in ambush. The Coeur d'Alenes also depended on the waterways to hunt small game, such as beaver, as well as migratory waterfowl. Test. of Hart, Tr. at 72-75; Hart Report (Ex. 1437) at 28-30; Test. of Sprague, Tr. at 769-75; Sprague Report (Ex. 2404) at 35-36; Ex. 105 at 27; Ex. 133 at 38-39; Ex. 171 at 101-03; Ex. 2271; Ex. 2271.

The Tribe gathered several plants growing in the marshes and wetlands of the Coeur d'Alene waterways. Most important among these was the water potato, a plant that was gathered annually by tribal members from the shallow waters of the Lake and rivers. The Coeur d'Alenes also collected rushes and tule from alongside the waterways for use in the construction of baskets, mats and the Tribe's lodges. Test. of Hart, Tr. at 80-81; Hart Report (Ex. 1437) at 33-36; Test. of Sprague, Tr. at 777, 790; Sprague Report (Ex. 2404) at 33-34.

The watercourses provided the primary highways for travel, trade and communication. Canoes were prevalent and constructed in several distinct styles. Travel was

measured in the days it took a canoe to get from point to point. Canoes also facilitated the Tribe's fishing and hunting activities. Test. of Hart, Tr. at 76-77; Hart Report (Ex. 1437) at 30-33; Test. of Sprague, Tr. at 780-85; Sprague Supplemental Report (Ex. 2405) at 3-6.

The Lake and rivers played an integral part in the Tribe's cultural activities. The waterways were tied to the Tribe's recreational pursuits, religious ceremonies and burial practices. In this respect, the Lake and rivers served not only as the means by which the Tribe ensured its corporeal survival, but also as the source of the Tribe's spiritual and cultural identity. Test. of Hart, Tr. at 81-87; Hart Report (Ex. 1437) at 34, 36-43; Test. of Sprague, Tr. at 786-89, 797-800; Sprague Report (Ex. 2404) at 48-50; Ex. 112 at 88-94.

The Tribe augmented its year-round dependence on the water resource by engaging in seasonal subsistence activities. In summer, the Coeur d'Alenes harvested camas, a plant yielding a fleshy bulb. Hangman Valley was the site of extensive camas fields and therefore an important area within the Tribe's aboriginal territory. Tribal members also harvested berries throughout the summer as they ripened at successive elevations. Test. of Sprague, Tr. at 776-78; Sprague Report (Ex. 2404) at 33; Ex. 133 at 21; Ex. 171 at 88-93

With the advent of the horse, some tribal member traveled to the Plains during the late fall to participate in an annual buffalo hunt. In this regard, the acquisition of the horse reduced somewhat the Tribe's reliance on fishing and small game hunting. Cox Report (Ex. 1437) at 11; Ex. 33 at 142-46; Ex. 171 at 151-52. However, the majority

of Coeur d'Alenes continued to live along the waterways and engage in a traditional subsistence lifestyle. The pastoral influence arising from the introduction of the horse and buffalo hunt most significantly affected the villages located near the Spokane (Rathdrum) Prairie, but even at these sites tribal members continued to depend on the water resource.[7] Test. of Hart, Tr. at 87-89; Test. of Sprague, Tr. at 779-80, 804-07; Test. of Cox, Tr. at 1537-40, 1574-75; Cox Report (Ex. 1437) at 12, 14-17, 27-28; Power Report (Ex. 2325) at 3-4; Ex. 26 at 10, 189-90; Ex. 33 at 145-46; Ex. 137 at 175-76; Ex. 232 at 710-11.

By the 1840's, the Coeur d'Alenes had begun to cultivate small garden plots, rarely exceeding an acre or two. The primary crops were potatoes and wheat. While the Tribe's agricultural endeavors augmented its traditional lifestyle, it did not supplant the Tribe's dependence on the waterways for a steady source of fish, fowl and plants. The limited quantities and seasonal availability of garden produce served at most as a supplement to the continuous and stable source of food and fibre provided by the water resource. Test. of Hart, Tr. at 145-46; Test. of Sprague, Tr. at 793, 833; Sprague Supplemental Report (Ex. 2405) at 3; Test. of Power, Tr. at 1489-92; Test. of Cox, Tr. at 1541-46, 1576-79; Cox Report (Ex. 1437) at 19-20, 23, 25; Ex. 101 at 158-61, 204; Ex. 2275 at 30; Ex. 2358 at 68, 73.

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[7] The State contends that following the acquisition of the horse many tribal members relocated from stream side villages to open, grassy areas, adopted pastoralism, and abandoned the Tribe's traditional subsistence lifestyle. The weight of the evidence demonstrates, however, that the majority of Coeur d'Alenes continued to live along the waterways and depend on the water resource for food, fibre and transportation.

To summarize, the majority of the Tribe's population lived in villages located next to the Lake and rivers. The Tribe's proximity to the watercourses was no coincidence; the Lake and rivers provided resources that were essential to the Coeur d'Alenes' survival. The Tribe depended on the waterways for a year-round source of fish, small mammals, waterfowl and plant materials. The Tribe also depended on the waterways to facilitate the harvest of large mammals and to serve as a means of efficient transportation. Finally, the Tribe's spiritual, religious and social life centered around the Lake and rivers.

The Court's findings are based in part on the expert testimony of Mr. Richard Hart, Dr. Roderick Sprague, Dr. Thomas Power and Dr. Thomas R. Cox.[8]

The opinions of these witnesses were well within their respective areas of expertise, supported by the documentary evidence and were not diminished on cross-examination. In addition, the Court's findings are supported by the various scientific studies and oral histories submitted by the parties. Archaeological, ethnographic and linguistic studies, as well as tribal traditions and histories, confirm that the Coeur d'Alenes located the majority of their villages along the Lake and rivers, and relied on the water resource to ensure their survival.

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[8] The State introduced the expert testimony and report (Ex. 3235) of Dr. Kent D. Richards to show that the Tribe was not dependent on the Lake and rivers. However, Dr. Richards' opinions on this issue were significantly undermined on cross-examination and, in any event, the great weight of the evidence is to the contrary.

Based on the above findings, the Court concludes that the Tribe depended on the Lake and associated rivers for a significant portion of its needs. *Cf. Aam*, 887 F.2d at 196-97. The waterways were essential to the Tribe's livelihood, providing a reliable year-round source of food and fibre. *See Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918); *Puyallup Indian Tribe*, 717 F.2d at 1259; *cf. Skokomish Indian Tribe v. France*, 320 F.2d 205, 210-12 (9th Cir. 1963), *cert. denied*, 376 U.S. 943 (1964). Furthermore, the Coeur d'Alenes "depended on watercourses, not only for food and materials, but also in their manner of self-identification, language and religious practices." *Muckleshoot Indian Tribe*, 713 F.2d at 458.

3. At the time of the 1873 Executive reservation, the Federal Government was plainly aware of the vital importance of the submerged lands and the water resource to the Tribe.

At the time of the 1873 Executive reservation, the Federal Government was plainly aware of the Tribe's dependence on the Lake and rivers. As discussed in detail below, the evidence shows that in 1873 the majority of tribal members continued to rely on the water resource for a significant portion of their needs. Moreover, events immediately preceding and following the 1873 agreement demonstrate that government officials were made aware of the Tribe's reliance on the waterways. The fact that the boundaries of the reservation, as determined by the 1873 agreement and endorsed by the Executive Order, were drawn to include the Lake and rivers leads the Court to conclude that a purpose of the 1873 Executive reservation

was to retain the submerged lands for the benefit of the Tribe.

(a) The Tribe continued to be dependent on the water resource in 1873.

Non-Indian contact with the Tribe increased through the early and middle 1800's. Of particular importance to the Coeur d'Alenes was the arrival of Jesuit missionaries in 1842. During the next fifty years, the Jesuits exerted considerable influence over the Tribe's cultural development, often acting as advisors to the Tribe in its dealings with the Federal Government. In numerous and detailed recorded accounts, the Jesuit priests described the Tribe's traditional reliance on the Lake and rivers. Test. of Hart, Tr. at 92-110; Hart Report (Ex. 1437) at 52-68, 91-93; Test. of Sprague, Tr. at 747-48; Sprague Report (Ex. 2404) at 52-54.

In 1846, the Jesuits established the Mission of the Sacred Heart on the Coeur d'Alene River and with the help of tribal members began farming. Eventually, the Mission's farm totaled 200 acres. The agricultural production from the Mission farm, however, did not play a significant role in the Coeur d'Alenes' diet. Test. of Hart, Tr. at 164, 518-19, 1615-16; Hart Report (Ex. 1437) at 99; Test. of Sprague, Tr. at 804-06; Ex. 60 at 61-64; Ex. 1147 at 1-2; Ex. 2221 at 159; Ex. 2265 at 997; Ex. 2358 at 78-86. While many of the federal officials that interacted with the Coeur d'Alenes during the 1850's and early 1860's commented on the Tribe's agricultural efforts, they also noted the Tribe's use of the Lake and rivers. Hart Report (Ex. 1437) at 69-73, 87-91, 96-98; Ex. 100 at 84; Ex. 168 at

135, 147-48; Ex. 208 at 372; Ex. 2222 at 366-68; Ex. 2338 at 30, 42, 49; Ex. 2409; Ex. 3029 at 36-40; Ex. 3033.

After completion of the Mullan Road in 1862, the Mission experienced an influx of emigrants, miners and other travelers. This proved to be the beginning of a gradual invasion of the Tribe's aboriginal territory. In 1867, apprehension over the effect of the Tribe's aboriginal title on non-Indian ownership claims prompted the President to establish a reservation for the Coeur d'Alenes. The 1867 reservation consisted for the most part of the area known as Hangman Valley and included only a small sliver of the Lake. Test. of Hart, Tr. at 132-33, 146-61; Hart Report (Ex. 1437) at 94-101, 102-07; Ex. 118 at 24-25; Ex. 227 at 192; Ex. 228 at 417-18; Ex. 239.

Apparently unaware of the 1867 Executive reservation, the Tribe in November of 1871 sent a petition to the Commissioner of Indian Affairs requesting a "charter to possess 20 or 25 miles square of land exclusively for us." Ex. 3066. The petition describes the relevant tract of land as "[t]hat-basin on both sides of Hang-man-creek called: Paradise Valley." *Id.* This description corresponds to the area known as Hangman Valley.

In late 1871 or early 1872, the Coeur d'Alenes became aware of the 1867 reservation and expressed their dissatisfaction with its boundaries. Ex. 307; Ex. 234 at 392. On November 18, 1872, tribal leaders sent a second petition to the Commissioner of Indian Affairs stating in part as follows:

> In our first petition we made no mention of our church nor of the two valleys of S. Joseph

> and Coeur d'Alene rivers, because in our ignorance we thought it a matter of course. . . .
>
> As to the two valleys, we did not think to ask for them, though they have been from old the habitual residence of most of us; because being every spring under water, we thought no white man could ever settle there in fact there is none as yet: the few spots which usually escape being inundated, we have them fenced in and cultivated. What we are unanimous in asking, besides the 20 square miles already spoken of, are the two valleys, the S. Josephs, from the junction of S. and N. forks, and the Coeur d'Alene from the Mission inclusively. It would appear too much, and it would be so if all or most of it were fit for farming but the far greatest part of it is either rocky or too dry, too cold or swampy; besides we are not as yet quite up to living on farming: with the work of God we took labor too, we began tilling the ground and we like it: though perhaps slowly we are continually progressing; but our aided industry is not as yet up to the white man's. We think it hard to leave at once old habits to embrace new ones: for a while yet we need have some hunting and fishing.

Ex. 300.[9] The second petition makes three points relevant to the Court's present inquiry. First, the Tribe never entertained the possibility of withdrawing to a reservation that did not include the river valleys. Second, the Tribe considered the area adjacent to the waterways its home.

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[9] After considering all the evidence, the Court finds that the second petition was received by the Department of Interior on March 7, 1873. Ex. 2351; Test. of Richards, Tr. at 1427-33.

Third, and most important, in 1872 the Tribe continued to rely on the water resource for a significant portion of its needs. *Id.*

While the second petition makes clear the Tribe's continuous reliance on the Lake and rivers, other sources reporting on the Tribe's economic status during the late 1860's and early 1870's offer conflicting assessments. Several reports emphasize the Tribe's commitment to farming, Ex. 233 at 726; Ex. 303; Ex. 3239; Ex. 3245, while other accounts note the Tribe's continued reliance on fishing, Ex. 305; Ex. 232. Most important among the latter is a letter from David P. Thompson to the Commissioner of the General Land Office, dated May 6, 1873, urging that the 1867 reservation be enlarged to include the waterways because "[s]hould the fisheries be excluded there will in my opinion be trouble with these indians but should they be included and also the mission which should also be in the Reservation there will be no trouble."[10] Ex. 305. Also significant is the 1871 Agent report by W.P. Winas, observing that: "The Coeur d'Alenes reside on Spokane Prairie, and their number living in this Territory is about one hundred and fifty. They farm on a small scale, but subsist principally by hunting and fishing."[11] Ex. 232 at 711.

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[10] In his letter, Thompson states that his information comes from Rev. Father Cataldo, who he "knows . . . represents the views of the Indians." Ex. 305. Thompson's letter eventually was forwarded to the Commissioner of Indian Affairs. Ex. 306.

[11] Significantly, tribal members living on the Spokane Prairie were from that portion of the Tribe most willing to adopt an agrarian based lifestyle. *See, e.g.* Test. of Sprague, Tr. at 804-06; Test. of Cox, Tr. at 1537-40, 1574-75; Cox Report (Ex. 1437) at 12, 14-17, 27-28.

Having considered all the evidence, the Court finds that at the time of the Executive reservation in 1873 the Tribe continued to be dependent on the Lake and rivers. Reports describing the Tribe's agricultural successes are in conflict with other official assessments, are not necessarily based on personal knowledge, and may be tainted by cultural and personal bias. Depictions of agricultural activity most likely are based on the Tribe's maintenance of garden plots, horses and, in some cases, cattle. Estimates of farmed acreage and agricultural output demonstrate that in the early 1870's the Coeur d'Alenes were not engaged in systematic farming practices. Test of Hart, Tr. at 524-25, 539-43, 1609-15, 1620-23; Test. of Sprague, Tr. at 830-33; Test. of Power, Tr. at 1480-92, 1496-1500; Power Report (Ex. 2325) at 4-8; Test. of Cox, Tr. at 1556-57; Cox Report (Ex. 1437) at 25; Ex. 232 at 711; Ex. 2340; Ex. 3034.

In this regard the Court rejects the State's contention that the "Big Move" to the Hangman Valley area occurred in the late 1860's and early 1870's, and that by 1873 the Tribe had converted to an agrarian based society, no longer dependent on the Lake and rivers. All competent evidence shows that the Tribe's "Big Move" to Hangman Valley started sometime after 1873 and that the Tribe's sole reliance on systematic agricultural practices did not become a reality until much later. *E.g.*, Test of Hart, Tr. at 88-89, 1627-28; Ex. 60 at 61-69; Ex. 206 at 42, 44; Ex. 240 at 250; Ex. 243 at 212; 214; Ex. 245 at 205-06; Ex. 1147 at 1-21.

Other evidence indicates that in 1873 the Tribe continued to depend on the water resource for a significant portion of its needs. Ex. 305; Ex. 232 at 711. Most important, the second petition provides the Tribe's own assessment of its ability to live without the resources provided

by the Lake and rivers. In no uncertain terms, the Coeur d'Alenes made it be known that their continued reliance on the waterways was necessary to ensure their survival. Ex. 300.

Based on all the above, the Court concludes that in 1873 the Lake and rivers were an essential part of the "basket of resources" necessary to sustain the Tribe's livelihood. While tribal members also engaged in gardening, gathering and hunting, the waterways provided a reliable, year-round source of food, fibre and transportation without which the Tribe could not have survived. *Alaska Pacific Fisheries*, 248 U.S. at 89; *Puyallup Indian Tribe*, 717 F.2d at 1259; *Muckleshoot Indian Tribe*, 713 F.2d at 458; *cf. Aam*, 887 F.2d at 196-97; *Skokomish Indian Tribe*, 320 F.2d at 209.

(b) The Federal Government was plainly aware of the Tribe's dependence on the Lake and rivers at the time of the Executive reservation in 1873.

On July 1, 1873, the Commissioner of Indian Affairs directed a three member Commission to visit non-treaty tribes in Idaho, including the Coeur d'Alenes, for the purpose of inducing the tribes "to abandon their roaming habits and consent to confine themselves within the limits of such reservation or reservations as may be designated for their occupancy." Ex. 309 at 1; Ex. 234 at 17, 385. The Commission members included J.P.C. Shanks, Chairman of the House Committee on Indian Affairs, Thomas Bennett, Territorial Governor of Idaho, and John

Monteith, Agent to the Nez Perce Indians. The Commission arrived at the Lake on July 23, 1873, spent two days examining the boundaries of the proposed reservation, and met in council with the Tribe on July 25, 26 and 27. An agreement was signed on July 28, 1873. Ex. 315; Ex. 645.

The agreement called for setting aside a significantly larger portion of the Tribe's aboriginal territory than had been reserved by the 1867 Executive Order. Besides Hangman Valley, the boundaries of the proposed reservation enclosed all but a small portion of the Lake, the Coeur d'Alene River, from its mouth to the Sacred Heart Mission, the St. Joe River, from its mouth to the present-day site of St. Maries, and a tract of land lying to the south of the Spokane River. The precise boundaries of the expanded reservation were identified by reference to a legal description. Under the agreement, the eastern boundary of the reservation was to head north "in a direct line, to the Coeur d'Alene Mission, on the Coeur d'Alene river (but not to include the lands of said Mission)," with the northern boundary heading "thence in a Westerly direction, in a direct line, to the point where the Spokane River heads in or leaves the Coeur d'Alene lake; thence down along the center of the channel of said Spokane River to the dividing line between the Territories of Idaho, and Washington." In addition to expanding the boundaries of the reservation to include the Lake and rivers, the agreement also guaranteed "that the water running into said reservation shall not be turned from their natural channel where they enter said reservation." In exchange for this enlarged reservation, and other compensation, the Tribe agreed to relinquish all claims to the

remainder of its aboriginal lands. The agreement provided that it was not binding on the parties until ratified by Congress. Ex. 645.

In a letter to the Commissioner of Indian Affairs, dated August 6, 1873, Agent Monteith listed four reasons for enlarging the boundaries of the 1867 reservation: first, an adjustment in the southwest boundary would include "several Indian farms" and exclude "four places belonging to white settlers;" second, running the eastern boundary north to the Mission "will leave some good farming land in the Upper Latah and will take in several farms around the new Mission on the Coeur d'Alene river;" third, "by running down the Spokane [the Tribe] can put the mills at the upper falls at much less expense than building a steam mill;" and fourth, "[b]y following the Washington and Idaho line to the dividing ridge between the Latah and Pine Creek it will include all Indian farms in Idaho and leave out all white settlements." Ex. 315. Although three of the four reasons for expanding the reservation focus on the location of agricultural lands, other than the specific areas identified by Monteith, the majority of the expanded reservation was not suitable for farming.[12] Ex. 300; Ex. 305; Ex. 2316(B).

In response to public criticism, Governor Bennett also sought to justify the Commission's decision to agree to an enlarged reservation. In a letter to the *Idaho Signal*, dated October 4, 1873, Governor Bennett stated: "We found that the Indians *demanded* an extension of their reservation so

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[12] Much of the land added by the 1873 agreement was later characterized by the Federal Government as not suitable for agriculture. Ex. 213 at 4, attach; Ex. 215 at 2, 4.

as to include the Catholic Mission and fishing and mill privileges on the Spokane River." Ex. 704 (emphasis in original).

On November 4, 1873, the Commissioner of Indian Affairs sent a letter to the Secretary of Interior that described the boundaries of the proposed reservation and then stated:

> In order that the tract thus described may be protected from trespass by white persons pending the action of Congress upon said agreement, I have the honor to recommend that the President be requested to issue an Executive Order setting apart the same for the use of said Indians.

Ex. 3240. Incorporating the legal description from the 1873 agreement, President Ulysses S. Grant, on November 8, 1873, "ordered that . . . the same is hereby withdrawn from sale and set apart as a reservation for the Coeur d'Alene Indians." Ex. 275 at 72.

In 1883, the Federal Government surveyed the boundaries of the 1873 reservation. Consistent with the description of the boundaries set forth in the 1873 agreement and adopted by the Executive Order, the instructions to the surveyor directed him to run the northern boundary across the Lake from the Sacred Heart Mission to the head of the Spokane River. By locating the northern boundary across the Lake, a portion of the Lake's north end was excluded from the reservation. Surveying a boundary across a navigable waterway was contrary to the usual practice of meandering a survey line along the mean high water mark. The 1883 survey fixed the reservation's total area at 598,499.85 acres, a calculation that

included submerged lands under the Lake and rivers within the boundaries of the reservation. Test. of Willett, Tr. at 887-99; Hart Report (Ex. 1437) at 354-62; Ex. 213; Ex. 699.

Based on the foregoing, the Court concludes that in 1873 the Federal Government was plainly aware of the Tribe's dependence on the Lake and rivers. As recounted above, from first contact with the Coeur d'Alenes, government officials noted the Tribe's reliance on the water resource. Any uncertainty concerning the extent of the Tribe's dependence on the Lake and rivers in 1873 was dispelled by the Tribe's request in the second petition for inclusion of the waterways in an expanded reservation. Most important, during the 1873 negotiations the Coeur d'Alenes reiterated their demand that the 1867 reservation be enlarged to include the Tribe's traditional fishing grounds. According to Governor Bennett, the expanded boundaries fixed by the 1873 agreement reflected the United States' realization that the Coeur d'Alenes required a reservation that included the Tribe's fishery. Thus, at the time of the 1873 reservation the "Government's Indian agents understood that 'the capture of fish was an essential source of the Indians' food supply.' "[13]

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[13] Contrary to the State's argument, the Plaintiffs are not required to show that the President, Secretary of Interior or Commissioner of Indian Affairs actually knew of the Tribe's dependence on the waterways. It is necessary only to show that the government's agents involved in the events giving rise to the reservation or grant of the submerged lands were plainly aware of the Tribe's dependence. *See Muckleshoot Indian Tribe*, 713 F.2d at 457-58; *Puyallup Indian Tribe*, 717 F.2d at 1259-61

Muckleshoot Indian Tribe, 713 F.2d at 458; *see also Puyallup Indian Tribe*, 717 F.2d at 1259-61.

The Plaintiffs have established each component of the three-part test developed by the Ninth Circuit in *Puyallup Indian Tribe*, 717 F.2d at 1258. The parties agree, and the Court finds, that the disputed submerged lands lie beneath navigable waters and within the exterior boundaries of the present-day Coeur d'Alene Reservation. The great weight of the evidence demonstrates that in 1873 the Tribe depended on the water resource for a significant portion of its needs. Finally, the evidence shows that the Federal Government was plainly aware of the Tribe's dependence at the time of the Executive reservation. *See Puyallup Indian Tribe*, 717 F.2d at 1259-61; *Muckleshoot Indian Tribe*, 713 F.2d at 456-58; *cf. Aam*, 887 F.2d at 196-97; *Aranson*, 696 F.2d at 666; *Skokomish Indian Tribe*, 320 F.2d at 210-12. By satisfying the *Puyallup* test, the Plaintiffs have successfully demonstrated that the Executive intended to reserve for the benefit of the Tribe the submerged lands within the 1873 reservation. *See Puyallup Indian Tribe*, 717 F.2d at 1258-61; *Muckleshoot Indian Tribe*, 713 F.2d at 457-58.

(c) Compelling evidence and/or a public exigency supports the conclusion that the Federal Government intended to include the submerged lands within the 1873 reservation.

At least one Ninth Circuit case holds that in addition to satisfying the *Puyallup* test a plaintiff must present

"compelling evidence" to show a "public exigency" justified the Federal Government's retention of submerged lands for the benefit of a tribe. *Pend Oreille Pub. Util. Dist. No. 1*, 926 F.2d at 1510-11. The United States Supreme Court, however, recently explained that a plaintiff has no such burden. In *Alaska*, the Supreme Court expressly rejected the notion that to succeed on a quiet title action a plaintiff must prove that a "public exigency" supported the reservation of submerged lands. 117 S. Ct. at 1909, 1915.

But even if controlling law required the Plaintiffs to show a "public exigency" existed at the time of the 1873 reservation, there is sufficient evidence to support a finding on this issue. Both the Supreme Court and the Ninth Circuit have held that a tribe's dependence on submerged lands constitutes a "public exigency." *E.g., Montana*, 450 U.S. at 556; *Aam*, 887 F.2d at 197-98; *Aranson*, 696 F.2d at 666; *Confederated Salish & Kootenai Tribes of Flathead Reservation, Mont. v. Namen*, 665 F.2d 951, 962 (9th Cir.), *cert. denied*, 459 U.S. 977 (1982). Because the Plaintiffs in this case have shown that the Tribe's survival was dependent on the retention of the disputed submerged lands, they also have shown that a "public exigency" supported the Executive reservation of those same lands. *See, e.g., Alaska Pacific Fisheries*, 248 U.S. at 89; *Namen*, 665 F.2d at 962; *cf. Montana*, 450 U.S. at 556.

Furthermore, in this case the evidence is sufficient to establish the existence of other circumstances that also constitute a "public exigency." The facts demonstrate that an influx of non-Indians into the Tribe's aboriginal territory prompted the Federal Government to negotiate with the Coeur d'Alenes in an attempt to confine the Tribe to a

reservation and to obtain the Tribe's release of its aboriginal lands for settlement. Before it would agree to these conditions, however, the Tribe demanded an enlarged reservation that included the Lake and rivers. Thus, the Federal Government could only achieve its goals of promoting settlement, avoiding hostilities and extinguishing aboriginal title by agreeing to a reservation that included the submerged lands. Under similar circumstances, courts have found a "public exigency" sufficient to justify the Federal Government's decision to reserve the submerged lands. *See Pend Oreille Pub. Util. Dist. No. 1*, 926 F.2d at 1510-11; *Puyallup Indian Tribe*, 717 F.2d at 1258-61; *Muckleshoot Indian Tribe*, 713 F.2d at 457-58.

Separate and apart from the evidence supporting a "public exigency" and the three-part *Puyallup* test, there is "compelling evidence" demonstrating the Federal Government's intent to reserve the submerged lands for the benefit of the Tribe. *Cf. Pend Oreille Pub. Util. Dist. No. 1*, 926 F.2d at 1510-11 (holding that evidence of tribal dependence upon a river and the United States' awareness of that dependence is insufficient to satisfy plaintiff's burden without additional "compelling evidence" of federal intent to retain submerged lands for benefit of tribe).[14] Under the analysis employed by the Supreme Court in

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[14] The panel's utilization of a "compelling evidence" standard in *Pend Oreille Pub. Util. Dist. No. 1* is an anomaly; no other Ninth Circuit decision and no Supreme Court opinion has ever employed a "compelling evidence" standard in a submerged land case.

Alaska, the language of the relevant documents, the location of the reservation boundaries in relation to the submerged lands and the purpose of the reservation are all highly relevant to ascertaining the intention of the Federal Government. *See, e.g.* 117 S. Ct. at 1908. In this case, evidence relating to each consideration shows that the actions of the Executive reflected a clear intent to include the submerged lands within the reservation.

The Supreme Court's submerged land cases "establish that the fact that navigable waters are within the boundaries of a conveyance or reservation does not in itself mean that submerged lands beneath those waters were conveyed or reserved." *Id.* On the other hand, where an Executive order setting aside a reservation does more than "merely define a boundary that encloses a body of navigable water," the description of the reservation's boundaries in relation to the submerged lands may signal an intent to retain federal ownership. *Id.* Here, the 1873 Executive Order uses the Coeur d'Alene River, Spokane River and Lake as reference points for describing the boundaries of the reservation. Moreover, the 1873 agreement guarantees "that the water running into said reservation shall not be turned from their natural channel where they enter said reservation." Ex. 645. Reference to these water features in the 1873 agreement and Executive Order suggests a federal intent to include submerged lands within the reservation. *See Alaska*, 117 S. Ct. at 1908, 1914; *Namen*, 665 F.2d at 962.

Even more important, the 1873 Executive Order expressly describes a northern boundary that runs across the waters of the Lake and down the center of the Spokane River. Fixing a boundary line across a navigable

body of water was contrary to the usual practice of meandering a boundary along the mean high water mark. *See Skokomish Indian Tribe*, 320 F.2d at 207. By defining the northern boundary in terms of the waterways, the Executive Order necessarily included within the reservation the lands beneath the Lake and Spokane River lying to the south of the boundary, and excluded from the reservation submerged lands lying to the north of the boundary. "It would have been pointless, and quite likely deceptive, to have the northern boundary of the reservation bisect [the] Lake unless it was intended to convey title to the southern [portion] of that lake to the Indians." *Namen*, 665 F.2d at 962.[15] Significantly, the official survey calculated the reservation's total area at 598,499.85 acres, a figure that included the submerged lands within the reservation boundaries. *Cf. Skokomish Indian Tribe*, 320 F.2d at 209 (stating that failure to include submerged lands in reservation's acreage computation indicates there was no intention to set aside those lands for tribal use). Thus, the clear intent to retain the submerged lands can be found in the 1873 Executive Order, which "by its 'terms embraces the land under the waters of the . . . [L]ake.' " *Pend Oreille*

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[15] In *Namen* the Ninth Circuit also noted that had the Federal Government "intended not to convey the southern half of the lake to the Indians, it could easily have defined the Reservation's northern boundary, upon reaching the west shore of the lake, as running along the shore of the southern half of [the] Lake." 665 F.2d at 962 n.28. The same can be said here: if the intent was to exclude submerged lands from the 1873 reservation, the Federal Government could have defined the northern boundary, upon reaching the Mission, as running along the shore of the southern part of the Lake to the head of the Spokane River. *See* Test. of Willett, Tr. at 899.

Pub. Util. Dist. No. 1, 926 F.2d at 1511 (quoting *Montana*, 450 U.S. at 552 and citing *Namen*, 665 F.2d at 962); *see also Alaska*, 117 S. Ct. at 1908, 1914.

Under *Alaska*, the purpose of the reservation also "is a critical factor in determining federal intent." 117 S. Ct. at 1908. Looking first to the Executive Order for any statement of purpose, it announces that the area described in the 1873 agreement is "withdrawn from sale and set apart as a reservation for the Coeur d'Alene Indians." Ex. 275 at 72. Focusing on the language of the Executive Order that withdraws the reserved land from sale and on language from an official report that explains the reservation had been set aside "in order that white persons may be prohibited from settling thereon," Ex. 234 at 392; Ex. 3240, the State argues that the Executive Order did not include submerged lands within the reservation because such lands are not subject to sale or settlement. The State reads the Executive Order too narrowly. Although the Executive Order did seek to preclude appropriation of lands within the reservation, it also had a much broader purpose: to create a reservation for the exclusive use of the Tribe "pending the action of Congress upon [the 1873] agreement." Ex. 3240; *see also* Ex. 275 at 72; Ex. 324 at 385. Because the reservation was not designed solely to prevent appropriation of lands, the Court must look to the purpose of the 1873 agreement to determine whether the reservation embraced submerged lands.

In 1873 the Federal Government sought an agreement with the Coeur d'Alenes in order to confine the Tribe to a reservation and extinguish the Tribe's aboriginal title. Ex. 228; Ex. 324 at 385, 392; Ex. 704. The Tribe had refused to

settle within the confines of the 1867 reservation. Ex. 307; Ex. 234 at 392. Thus, the Federal Government could only achieve its goals – to extinguish aboriginal title and free tribal lands for settlement – by agreeing to an expanded reservation. In this regard, the Coeur d'Alenes demanded an enlarged reservation that included the Tribe's fishing grounds, a mill site and the Mission. Ex. 300; Ex. 315; Ex. 704. The Tribe's demand for its fishing grounds and a mill site could not be satisfied without an agreement that included within the reservation the land under the Lake and rivers. That the Federal Government did in fact agree to reserve the submerged lands for the benefit of the Tribe is demonstrated by the following factors: 1) the United States was aware that the waterways were essential to the Tribe's livelihood; 2) the boundaries of the enlarged reservation were drawn to include the Lake and rivers; 3) the expanded reservation did not add significantly to the agricultural land base already reserved by the 1867 Executive Order; 4) the description of the reservation's boundaries by its terms embraced the submerged lands; and 5) a member of the Commission, Governor Bennet, acknowledged that the expansion of the reservation was for the purpose of meeting the Tribe's demand for its fishing grounds and a mill site. *Cf. Skokomish Indian Tribe*, 320 F.2d at 210 (denying tribal title to submerged lands after explaining "that the [Skokomish] reservation was intended only as a residence, and the Indians were to remain free to roam and fish at their usual places").[16]

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[16] In contrast to the intended purpose of the reservation created for the Indians in *Skokomish Indian Tribe*, here a reason for expanding the reservation to include the Tribe's fishery was precisely so that tribal members could be confined within its

This evidence leads the Court to conclude that a purpose of the 1873 agreement was to provide the Tribe with a reservation that granted tribal members exclusive use of the water resource. Because an object of the 1873 Executive Order was, in part, to create a reservation for the Coeur d'Alenes that mirrored the terms of the 1873 agreement, a purpose of the Executive Order was to reserve the submerged lands under federal control for the benefit of the Tribe. *See, e.g., Puyallup Indian Tribe*, 717 F.2d at 1260-61.

In sum, the intent of the Federal Government to include submerged within the 1873 reservation can be garnered from numerous sources. The evidence supports a finding in favor of the Plaintiffs on each element of the three-part *Puyallup* test. There also is sufficient evidence to demonstrate a "public exigency" existed at the time of the 1873 reservation. In addition, the terms and purpose of the 1873 agreement and Executive Order provide "compelling evidence" of a federal intent to reserve the submerged lands. The Court therefore concludes that the actions of the Executive reflected a clear intent to retain for the benefit of the Tribe the submerged lands within the 1873 reservation.

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boundaries. Indeed, Commission member Governor Bennet had earlier stated his belief that to avoid conflicts with whites an Indian reservation *must* include the areas relied upon by a tribe for hunting and fishing. *Eg.* Ex. 1346.

B. Congress Ratified the 1873 Executive Reservation of Submerged Lands and Demonstrated a Clear Intent to Defeat Idaho's Title.

Although a purpose of the Executive Order was to set apart a reservation for the Coeur d'Alene Indians "pending the action of Congress," the 1873 agreement never was ratified by Congress. Nevertheless, the Executive Order effectively conveyed to the Tribe a beneficial interest in the reservation's lands. *Puyallup Indian Tribe*, 717 F.2d at 1261 n.10. Until Congress approved the Executive reservation, however, the Tribe's property right was "subject to termination at the will of either the executive or Congress." *Sioux Tribe of Indians v. United States*, 316 U.S. 317, 331 (1942). Similarly, without congressional approval of the Executive retention of submerged lands, the Tribe's beneficial ownership of those lands could not defeat the future State of Idaho's equal footing title. *Alaska*, 117 S. Ct. at 1910-11, 1915-17. Because the Plaintiffs do not contend that prior to 1873 Congress had authorized the Executive reservation of submerged lands, it is necessary to review events subsequent to the Executive Order of 1873 to determine whether Congress ratified the inclusion of the submerged lands within the reservation and demonstrated a clear intent to defeat the State's title to those lands. *See id.*

1. Prior to Idaho's statehood, Congress was on notice that the Executive had reserved submerged lands for the benefit of the Tribe and Congress ratified the Executive retention of those lands, demonstrating a clear intent to defeat the future State of Idaho's equal footing title.

In an effort to secure permanent status for the 1873 reservation and obtain compensation for the loss of tribal lands to miners, settlers and other emigrants, the Tribe on March 23, 1885, submitted a petition to the Federal Government requesting that a Commission visit the Coeur d'Alenes to "make with us a proper treaty of peace and friendship . . . by which your Petitioners may be properly and fully compensated for such portion of their lands not now reserved to them; [and] that their present reserve may be confirmed to them." Ex. 206 at 42. In response, Congress authorized the Secretary of the Interior to negotiate with the Tribe "for the cession of their lands outside the limits of the present Coeur d'Alene reservation." Ex. 649. On March 26, 1887, the Tribe and representatives of the United States reached an agreement in which the Tribe ceded

> all right, title, and claim which they now have, or ever had, to all lands in said Territories and elsewhere, except the portion of land within the boundaries of their present reservation in the Territory of Idaho, known as the Coeur d'Alene Reservation.

Ex. 215 at 68. In exchange, the Federal Government promised "that the Coeur d'Alene Reservation shall be held forever as Indian land and as homes of the Coeur d'Alene

Indians." *Id.* The 1887 agreement provided that it "shall not be binding on either party until ratified by Congress." *Id.* at 69.

During this same time period, non-Indians continued to encroach on tribal lands and increasingly make use of the Lake and rivers. Beginning in 1880, steamboats operated on the Lake, delivering miners and supplies to a landing near the Old Coeur d'Alene Mission. Because government officials considered the Lake and rivers lying within the outer boundaries of the 1873 reservation to be "Indian country," the transportation or distribution of liquor on board the steamboats constituted a violation of the Intercourse laws.[17] Ex. 362; Ex. 364; Ex. 366; Ex. 370; Ex. 411; Ex. 2256; Ex. 3148; Ex. 3152. In one instance, the Acting Inspector General noted that "with the exceptions of a few indentations on its northern coast, the entire lake of Coeur d'Alene . . . lay wholly within the Coeur d'Alene Indian Reservation," and then went on to recommend that a steamboat be seized when he observed "an open bar was kept on the boat, at which drinks or various sorts of liquor, were very freely and frequently sold."[18] Ex. 426.

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[17] The Trade and Intercourse Act of 1834 "specifically penalized both the introduction of liquor into Indian country and the operation of a distillery therein." *Rice v. Rehner*, 463 U.S. 713, 722 n.8 (1983).

[18] The Secretary of War informed the Secretary of the Interior of the Acting Inspector General's recommendation and apparently the matter was discussed at a Cabinet meeting held on August 10, 1886. Ex. 418; Ex. 427. The day after the Cabinet meeting the Secretary of the Interior referred to the Commissioner of Indian Affairs, for immediate report and recommendation, this "violation of law relating to the sale of liquor on Indian reservations." Ex. 428.

In a similar manner, government officials treated non-Indians engaged in recreational use of the Lake and rivers as trespassers. Those trespassers found fishing within the boundaries of the reservation were ejected. In one report, a government official noted he had "removed from the Coeur d'Alene Lake & its tributary waters one hundred and fourteen (114) persons [who] were engaged in Camping & Fishing." Ex. 429; *see also* Ex. 2261.

Trespass on both the uplands and waterways of the reservation became so serious it was brought to the attention of Colonel Carlin, the commanding officer of Fort Sherman. Ex. 463; Ex. 465; Ex. 467; Ex. 468. Colonel Carlin, however, resisted employing his troops to remove the trespassers. He first suggested that the northern boundary of the reservation had not been properly surveyed, Ex. 470; Ex. 474; Ex. 2261, and argued for an adjustment in the reservation boundaries because "it must be apparent to the government that some provision must be made by which the white people can enjoy at least a portion of the lake there and its waters for pleasure as well as business," Ex. 2261. Finally, in a letter addressed to the Commissioner of Indian Affairs, dated December 19, 1887, Colonel Carlin recommended "that by executive and congressional action combined the lines [of the reservation] be changed" to locate the northern boundary line in the center of the Coeur d'Alene River, from the Mission to the river's mouth, and in the middle of the Lake, from the mouth of the Coeur d'Alene River to the head of the Spokane River. Ex. 480; Ex. 2333(map). Colonel Carlin explained that the new boundaries he proposed "would throw open to the public a part of the Lake for purposes of navigation and pleasure [and] would also throw open

to the public the tract of land lying between Coeur d'Alene River and the Lake which is known to be valuable for its minerals but nearly worthless for agriculture." Ex. 480.

In an apparent effort to clarify the status of the Lake and rivers, the Senate, on January 25, 1888, passed a resolution which repeated the allegations made by Colonel Carlin and others,[19] and requested a response from the Secretary of Interior:

> Whereas it is alleged that the present area of the Coeur d'Alene Indian reservation, in the Territory of Idaho, embraces 480,000 acres of land . . . [and] that Lake Coeur d'Alene, all the navigable waters of Coeur d'Alene River, and about 20 miles of the navigable part of St. Joseph River, and part of St. Mary's, a navigable tributary of the Saint Joseph, are embraced within this reservation, except a shore-line of about 3 1/2 miles at the north end of the lake . . . that all boats now entering such waters are subject to the laws governing Indian country and all persons going on such lake or waters within the reservation lines are trespassers; and
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> Whereas it is further alleged that the Indians now on such reservation are located in the extreme southwest corner of the same . . . and it being further alleged that all part of such reservation lying between Lake Coeur

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[19] In a petition to Congress, dated February 1, 1887, the Idaho Territorial Legislature asked that the northeast portion of the 1873 reservation be restored to the public domain and noted that "a navigable river [the Coeur d'Alene River] traverses said portion of the reservation from east to west." Ex. 3154 at 53.

> d'Alene and Coeur d'Alene River and that part between the Coeur d'Alene River and St. Joseph River is a territory rich in the precious metals and at the same time being of no real use or benefit to the Indians: Therefore,
>
> *Resolved*, That the Secretary of the Interior be, and he is hereby directed to inform the Senate as to the extent of the present area and boundaries of the Coeur d'Alene Indian Reservation . . . whether such area includes any portion, and if so, about how much of the navigable waters of Lake Coeur d'Alene and of Coeur d'Alene and St. Joseph Rivers . . . also whether, in the opinion of the Secretary, it is advisable to throw any portion of such reservation open to occupation and settlement under mineral laws of the United States, and if so, precisely what portion; and also whether it is advisable to release any of the navigable waters aforesaid from the limit of such reservation.

Ex. 187 at 693.

Responding on behalf of the Secretary of the Interior, the Commissioner of Indian Affairs, on February 7, 1988, reported to the Senate that "the reservation appears to embrace all the navigable waters of Lake Coeur d'Alene, except a very small fragment cut off by the north boundary of the reservation which runs 'in a direct line' from the Coeur d'Alene Mission to the head of Spokane River." Ex. 213 at 3. After describing the "proportion of the reservation" suitable for agriculture, grazing and mining, the Commissioner reiterated the question posed by the Senate resolution: whether it would be "advisable to throw any portion of the said reservation open to the occupation and settlement . . . and, if so, precisely what

portion, and whether it is desirable to release any of the navigable waters." *Id.* at 3-4. Based on his opinion "that the reservation might be materially diminished without detriment to the Indians," the Commissioner recommended "that changes could be made in the boundaries for the release of some or all of the navigable waters therefrom, which would be of great benefit to the public." *Id.* at 6. Although the Commissioner was "unable to say . . . [j]ust what portion of the reservation and navigable waters should be segregated from the reservation," he thought it could "be determined by negotiations with the Indians." *Id.* The Commissioner concluded his report by opining that after ratification of the 1887 agreement "it will be an easy matter to negotiate with [the Tribe] for the cession of such portions of their reservation as they do not need, including all or a portion of the navigable waters, upon fair and very reasonable terms." *Id.* The Commissioner attached to his report a map of the 1873 reservation which depicted the Lake and rivers in relation to the reservation's boundaries and which displayed the total area of the reservation as 598,499.85 acres.

It was against this backdrop that Congress in 1888 debated the merits of the 1887 agreement. A 1890 House Report explained that the Fiftieth Congress (1888 session) decided against ratifying the 1887 agreement

> for sundry reasons, among which was a desire on the part of the United States to acquire an additional area, to wit, a certain valuable portion of the reservation specially dedicated to the exclusive use of said Indians under an Executive order of 1873, and which portions of said lands, situate on the northern end of said reservation, is valuable and necessary to the citizens of the

> United States for sundry reasons. It contains numerous, extensive, and valuable mineral ledges. It contains large bodies of valuable timber. . . . It contains a magnificent sheet of water, the Coeur d'Alene Lake, and its chief tributary, to wit, the Coeur d'Alene River. . . .

Ex. 206 at 4.

While withholding its approval of the 1887 agreement, Congress took steps "to acquire . . . the northern end of [the 1873] reservation." *Id.* On March 2, 1989, Congress passed the annual Indian Appropriations Act, which included a provision that authorized the Secretary of the Interior "to negotiate with the Coeur d'Alene tribe of Indians for the purchase and release by said tribe of such portions of its reservation not agricultural and valuable chiefly for minerals and timber as such tribe shall consent to sell." Ex. 2288 at 1002.

In August and September of 1889, a three member Commission met with tribal leaders and negotiated for the release of the reservation's northern end. The minutes of the negotiations reveal that the location of the new boundaries in relation to the Lake and rivers was a matter of concern to both the Tribe and United States. Known for their sagacity, and aware of the Federal Government's tendency to disregard its commitments to the Indian tribes, the Coeur d'Alenes insisted on defining the terms of any new agreement with precision.[20] At one point

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[20] The Tribe's hard bargaining practices inspired French trappers to call tribal members "Coeur d'Alenes," which translates directly to "Heart of an Awl," but was commonly interpreted as meaning "Pointed Hearts." The name symbolized

during the negotiations, General Simpson, the government's chief spokesman, told tribal leader Chief Seltice that "the Lake belongs to you as well as to the whites – to all, every one who wants to travel on it." Ex. 215 at 9. Seltice replied: "That is your idea about the boundary. You know we do not understand papers; in taking it that way we will not know the boundaries." *Id.* General Simpson then offered the United States' proposal for a diminished reservation and prefaced his description of its boundaries by stating: "You all know where the St. Joseph River is. We do not want any of that." *Id.* The government's proposal called for a new northern boundary that ran east from the Idaho/Washington territorial line to the west shore of the Lake, meandered the lake shore south to a point directly opposite the mouth of the Coeur d'Alene River, and "thence due east across said lake." *Id.* Thus, the boundary line was drawn so as to bisect the Lake, with the northern two-thirds of Lake excluded from the reservation and the southern one-third of the Lake included within the new reservation boundaries. *See id.* at 14, attach.(map). General Simpson explained to the Tribe that under the government's proposal "if we buy this land [the northern end of the 1873 reservation] you still have the St. Joseph River and the lower part of the lake and all the meadow and agricultural land along the St. Joseph River." *Id.* at 9. With some modification, this proposal became the basis of an

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the trappers' perception that tribal members negotiated with a "hard heart." Hart Report (Ex. 1437) at 48-49.

agreement signed on September 9, 1889.[21] The agreement provided that it was "not binding on either party until ratified by Congress." *Id.* at 14.

In a 1889/90 Report of the Secretary of the Interior to the House of Representatives, the 1889 agreement is described as an agreement "whereby the Indians agreed to sell a considerable portion of their reservation (in the northern part), valuable chiefly for minerals and timber, and embracing by far the greater portion of the navigable waters of the reservation." Ex. 250 at 22; *see also* Ex. 206 at 4.

Prior to congressional approval of the 1887 and 1889 agreements, Idaho became a state. As part of that process, Congress passed the Idaho Statehood Act, which admitted Idaho "into the Union on an equal footing with the original States in all respects whatever; and . . . accepted, ratified, and confirmed" the Idaho State Constitution. Ex. 221 at 215. The state constitution contains a section disclaiming

> all right and title to the unappropriated public lands lying within the boundaries [of Idaho], and to all lands lying within [Idaho] owned or held by any Indians or Indian tribes; and until

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[21] Under the government's original proposal, the new boundary line, after crossing the Lake, was to meander "southerly along the east shore of said lake to a point 1 mile north of the St. Joseph River," and then head east to the eastern boundary. Ex. 215 at 9. Under the final agreement, the new boundary line ran "to a point due west of the mouth of the Coeur d'Alene River, where it empties into the said lake; thence in a due east line until it intersects with the eastern boundary of the said reservation." *Id.* at 3, 13, 14, attach.(map).

> the title thereto shall have been extinguished by the United States, the same shall be subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States.

Ex. 2294. Shortly after Idaho secured statehood, Congress, on March 3, 1891, ratified the 1887 and 1889 agreements. Ex. 3255.

Taken together, these events establish that Congress ratified the Executive reservation of the submerged lands and demonstrated the clear intent to defeat the future State of Idaho's title to those lands. The evidence shows that prior to Idaho's statehood, Congress was on notice that the Executive Order of 1873 reserved for the benefit of the Tribe the submerged lands within the boundaries of the Coeur d'Alene Reservation. The Senate pointedly asked the Secretary of Interior to confirm whether the Tribe retained control over the "navigable waters of Lake Coeur d'Alene and of Coeur d'Alene and St. Joseph Rivers." Ex. 187 at 693. The Commissioner of Indian Affairs, responding in detail, answered in the affirmative.[22] It is difficult to imagine a set of circumstances that could with any greater certainty place before Congress the fact that the 1873 reservation included the land beneath the Lake and rivers.[23] *Cf. Alaska*, 117 S. Ct. at

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[22] The House of Representatives also was on notice that the Executive reservation included the submerged lands. Ex. 206 at 4; Ex. 250 at 21-22.

[23] The actions by the Federal Government during the years following the 1873 agreement and Executive Order, which in all respects treat the submerged lands within the reservation as

1916-17 (finding Congress was on notice that an application reflected the Secretary of Interior's intent to reserve submerged lands where the action of making the application had been publicly announced, formal notice of the application had been published in the Federal Register and the Secretary had submitted a map to Congress showing the application area embraced submerged lands).

With this knowledge, Congress validated the Executive reservation of the submerged lands by enacting appropriation statutes that authorized government representatives to negotiate with the Coeur d'Alenes for a cession of tribal property. Ex. 99 at 272-73; Ex. 649; Ex. 2288. Most important, after the Commissioner of Indian Affairs had in no uncertain terms informed Congress that the Executive reservation included the submerged lands, Congress enacted a provision which authorized the Secretary of the Interior "to acquire . . . the northern end of said reservation." Ex. 206 at 4. By authorizing the Federal Government to negotiate with the Tribe for a release of the submerged lands, Congress acknowledged that the Executive Order of 1873 had effectively conveyed beneficial ownership of those lands to the Coeur d'Alenes. Accordingly, the Court concludes that Congress recognized and then ratified the Executive reservation of the

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belonging to the Coeur d'Alenes, confirm the Executive intent in 1873 to retain those lands for the benefit of the Tribe. *Alaska Pacific Fisheries*, 248 U.S. at 89-90 (finding support for conclusion that the Federal Government intended to reserve submerged lands for benefit of Indians in subsequent conduct that treated the reservation as including submerged lands).

submerged lands for the benefit of the Tribe.[24] *See, e.g., Alaska*, 117 S. Ct. at 1911, 1915-17 (holding that once Congress is on notice that the Executive intended to

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[24] The United State [sic] contends that despite the explicit language contained in both the 1887 and 1889 agreements, stating that they shall not be "binding on either party until ratified by Congress," each agreement became effective on the date signed. The Court need not decide this issue. The date that either agreement became effective is relevant to determining when, if ever, the Tribe ceded its title to certain lands. But because this case is limited to resolving ownership claims of submerged lands that never were ceded, the Court must only decide whether Congress ratified the Executive reservation of those lands prior to Idaho's statehood. As discussed above, the Court concludes that Congress ratified the inclusion of the submerged lands before Idaho became a state.

In the alternative, the United States asserts that the General Allotment Act of 1887 (the "Dawes Act") constituted congressional recognition of all Executive order reservations. Unfortunately for the government, the United States Supreme Court already has rejected this argument. *Sioux Tribe of Indians*, 316 U.S. at 330 (holding that the Dawes Act "did not amount to a recognition of tribal ownership"). It is noteworthy, however, that in 1890 the Commissioner of Indian Affairs also believed that the Dawes Act constituted a blanket recognition of all Executive reservations. He specifically related the purported effect of the Dawes Act to the status of the Coeur d'Alene Reservation: "The permanency of this tenure is further shown by the act of Congress authorizing and directing the Secretary of the Interior to negotiate with the Coeur d'Alene tribe of Indians in Idaho for the purchase and release of a portion of their reservation which was established by executive order. . . . " Ex. 1313. This is one more indication that Congress could have authorized the Secretary to negotiate with the Tribe for the release of the Lake and rivers only if at the same time Congress recognized the Tribe's beneficial ownership of the submerged lands.

reserve submerged lands, subsequent action by Congress that recognizes federal retention of those lands constitutes a ratification of the Executive action, and citing *Holden v. Joy*, 17 Wall. 211, 247 (1872) ("rejecting Property Clause challenge to President's treaty with Cherokee Nation; although terms of treaty exceeded express delegation of authority by Congress to the President, Congress had 'repeatedly recognized' the validity of the treaty by enacting appropriation statutes")); *see also Shoshone Tribe of Indians v. United States*, 299 U.S. 476, 494-96 (1937).

By explicitly recognizing, prior to Idaho's statehood, an Executive reservation that included submerged lands, Congress demonstrated the clear intent to defeat the State's equal footing title. *See Alaska*, 117 S. Ct. at 1910-11 (explaining that Congress has demonstrated the clear intent to defeat a state's equal footing title if prior to statehood Congress recognizes an executive reservation of submerged lands for a purpose that requires federal ownership). Retention of the submerged lands was necessary to achieve the United States' objective, *id* at 1910, and Congress clearly contemplated continued federal ownership of those lands, *id.* at 1917. The 1889 agreement by its terms anticipates that the Tribe will remain the beneficial owner of the southern third of the Lake. The northern boundary line of the diminished reservation was drawn so as to bisect the Lake, and the minutes of the 1889 negotiations confirm that the placement of the boundary line was for the purpose of establishing the Tribe's rights to the Lake and rivers. This is "compelling evidence" that the United States intended for the Tribe to hold a beneficial interest in the submerged lands under

the southern third of the Lake. *See, e.g., Namen*, 665 F.2d at 962 & n.28. Congress could not have carried into effect the terms of the 1889 agreement without retaining title to the submerged lands. Congress clearly demonstrated its intent to reserve the submerged lands under federal control by ratifying the Executive inclusion of the submerged land within the 1873 reservation.[25] *See Alaska*, 117 S. Ct. at 1910-11, 1915-17.

In the Idaho Statehood Act, Congress made explicit the intent to defeat Idaho's title to the submerged lands.

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[25] The issue at this point of the analysis is not, as the State seems to imply, whether the Federal Government intended to include submerged lands within the 1873 reservation or whether a "public exigency" supported such an inclusion; those questions were asked and answered in relation to the point in time that the Executive acted to create the reservation. *See, e.g., Alaska*, 117 S. Ct. at 1908-09, 1914-15. Instead the inquiry must now focus on whether Congress realized that in 1873 the President "construed his reservation authority to extend to submerged lands and had exercised that authority to set aside uplands and submerged lands" for the benefit of the Tribe and, if so, whether Congress ratified the Executive action and demonstrated the clear intent to defeat the State's title to those lands. *Id.* at 1911. As a practical matter, and as is true here, the congressional approval of an Executive reservation of submerged lands for a purpose that is inimical to State ownership often will also amount to a demonstration of Congress' intent to defeat the State's equal footing title. *See id.* at 1911-12, 1915-17; *cf. Utah Div. of State Lands*, 482 U.S. at 198-207 (explaining that where Congress has delegated to the Executive the power to reserve lands and there is no unambiguous evidence that members of Congress understood subsequent Executive reservations included submerged lands and purpose of reservation did not require federal ownership, plaintiff must show Congress "affirmatively intended to defeat the future State's title to such land").

In that statute, Congress admitted Idaho into the Union "on an equal footing with the original states," subject to the disclaimer clause of the Idaho State Constitution, which renounced the State's "right and title to the unappropriated public lands" and lands "owned or held by any Indians or Indian tribes." Ex. 2294. In this respect, the Idaho Statehood Act "operated to confirm [Idaho's] title to equal footing lands . . . unless the United States clearly withheld submerged lands . . . prior to statehood." *Alaska*, 117 S. Ct. at 1917; *see also United States v. Gardner*, 107 F.3d 1314, 1319-20 (9th Cir. 1996) (explaining that disclaimer clause is a recognition of preexisting United States title), *cert. denied*, 118 S. Ct. 264 (1997); *cf. Aam*, 887 F.2d at 198 (concluding that submerged lands were not "held" by tribe within meaning of disclaimer clause because tribe had not shown Federal Government reserved submerged lands for benefit of tribe). As explained above, the Executive Order of 1873 reflected a clear intent to reserve the submerged lands for the benefit of the Tribe and prior to Idaho's statehood Congress ratified the reservation of those lands. Thus, at the time Idaho secured statehood, the United States had clearly retained title to the submerged lands and conveyed a beneficial interest to the Tribe, thereby withholding, pursuant to the Idaho Statehood Act, the transfer of those lands to the State. *See Alaska*, 117 S. Ct. at 1916-17; *cf. Utah Div. of State Lands*, 482 U.S. at 202, 208.

2. The Plaintiffs have overcome the strong presumption of State ownership by demonstrating that the Federal Government intended to include the submerged lands within the Coeur d'Alene Reservation and that Congress intended to defeat the State's title to those lands.

In sum, the Court concludes that the United States retained, for the benefit of the Tribe, the submerged lands within the exterior boundaries of the present-day Coeur d'Alene Reservation.[26] Application of the three-part *Puyallup* test to the trial evidence demonstrates that the Federal Government clearly intended to include the submerged lands within the 1873 reservation. The evidence also shows a "public exigency" supported the Executive reservation of the submerged lands for the benefit of the Tribe. In addition, the terms and purpose of the 1873 agreement and Executive Order provide "compelling evidence" of a federal intent to reserve the submerged lands. The response of the Commissioner of Indian Affairs to the Senate resolution put Congress on notice that submerged lands had been included in the 1873 reservation. The fact that Congress directed the Secretary of the Interior to negotiate with the Tribe for a release of the submerged lands reflected Congress' intent to ratify the inclusion of submerged lands within the reservation and to defeat the State's title to those lands. In the Idaho

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[26] The Court's decision is expressly limited to a determination of the ownership of the submerged lands lying within the present-day boundaries of the Coeur d'Alene Reservation.

Statehood Act, Congress confirmed that the Federal Government retained title to the submerged lands for the benefit of the Tribe.[27]

C. Subsequent Events Substantiate That the Title to the Submerged Lands Did Not Pass to Idaho at Statehood.

Events subsequent to Idaho's admission into the Union support the conclusion that title to the submerged lands did not pass to Idaho at statehood. *See Alaska Pacific Fisheries*, 248 U.S. at 89-90 (finding support for conclusion that the Federal Government intended to reserve submerged lands for benefit of Indians in subsequent conduct that treated the reservation as including submerged lands). In 1893 and 1894, the Federal Government and the Tribe engaged in negotiations for the relinquishment of an area adjacent to the mouth of the Coeur d'Alene River. During the negotiations, the parties frequently referred to the fact that the 1889 agreement created a boundary line in relation to the Lake and mouth of the Coeur d'Alene River. *See* Hart Report (Ex. 1437) at 246-67; Ex. 207; Ex. 604. In a final agreement, the Tribe agreed to cede to the United States a one-mile strip of land, running from the mouth of the Coeur d'Alene River to the reservation's eastern boundary (the "Harrison cession"). Ex. 207.

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[27] In light of the Court's conclusion, it need not decide whether the doctrine of aboriginal title applies to submerged lands and, if so, whether the Tribe's aboriginal title to the submerged lands remains unextinguished.

The boundaries of the Harrison cession clearly reflect the Tribe's beneficial ownership of land underlying the Lake. The mile wide western boundary line is located in the Lake; the southern boundary begins at a right angle to the western boundary and runs east for more than a mile across the Lake. Ex. 140; Ex. 2334. A cession that included the lake bed would not have been necessary if title to the submerged lands had passed to Idaho at statehood.

V. ORDER

Based on the foregoing, and the Court being otherwise fully advised in the premises, **IT IS HEREBY ORDERED** that:

1. Title is quieted in favor of the United States, as trustee, and the Coeur d'Alene Tribe of Idaho, as the beneficially interested party of the trusteeship, to the bed and banks of the Coeur d'Alene Lake and the St. Joe River lying within the current boundaries of the Coeur d'Alene Indian Reservation;

2. The United States, as trustee, and the Coeur d'Alene Tribe of Idaho, as the beneficially interested party of the trusteeship, are entitled to the exclusive use, occupancy and right to the quiet enjoyment of the bed and banks of the Coeur d'Alene Lake and the St. Joe River lying within the current boundaries of the Coeur d'Alene Indian Reservation; and

3. The State of Idaho is permanently enjoined from asserting any right, title or otherwise interest in or to the bed and banks of the Coeur d'Alene Lake and the St. Joe

River lying within the current boundaries of the Coeur d'Alene Indian Reservation.

IT IS FURTHER ORDERED that the State of Idaho's counterclaim is **DENIED**.

IT IS FURTHER ORDERED that within fourteen (14) days of the date of this Order, the Plaintiffs shall submit a proposed judgment and decree.

DATED this 28th of July, 1998.

/s/ Edward J. Lodge
EDWARD J. LODGE
UNITED STATES DISTRICT JUDGE

March 3, 1891
26 Stat. 1027
1 Kappler 419

AGREEMENT WITH COEUR D'ALENE.

This agreement made pursuant to an item in the act of Congress entitled "An act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the year ending June thirtieth, eighteen hundred and eighty-seven, and for other purposes," approved May fifteenth, eighteen hundred and eighty-six, by John V. Wright, Jared W. Daniels, and Henry W. Andrews, duly appointed commissioners on the part of the United States and the Coeur d'Alene tribe of Indians now residing on the Coeur d'Alene Reservation, in the Territory of Idaho, by their chiefs, headmen, and other male adults, whose names are hereunto subscribed, they being duly authorized to act in the premises, witnesseth:

ARTICLE 1.

Whereas said Coeur d'Alene Indians were formerly possessed of a large and valuable tract of land lying in the Territories of Washington, Idaho, and Montana, and whereas said Indians have never ceded the same to the United States, but the same, with the exception of the present Coeur d'Alene Reservation, is held by the United States and settlers and owners deriving title from the United States, and whereas said Indians have received no compensation for said land from the United States: Therefore,

ARTICLE 2.

For the consideration hereinafter stated the said Coeur d'Alene Indians hereby cede, grant, relinquish, and quitclaim to the United States all right, title, and claim which they now have, or ever had, to all lands in said Territories and elsewhere, except the portion of land within the boundaries of their present reservation in the Territory of Idaho, known as the Coeur d'Alene Reservation.

ARTICLE 3.

The said Coeur d'Alene Indians agree and consent that the Upper and Middle bands of Spokane Indians residing in and around Spokane Falls in the Territory of Washington, may be removed to the Coeur d'Alene Reservation and settled thereon in permanent homes on the terms and conditions contained in an agreement made and entered into by and between John V. Wright, Jared W. Daniels, and Henry W. Andrews, commissioners on the part of the United States and said Spokane Indians, concluded on the fifteenth day of March, eighteen hundred and eighty-seven, at Spokane Falls, in the Territory of Washington.

ARTICLE 4.

And it is further agreed that the tribe or band of Indians known as the Calespels, now residing in the Calespel Valley, Washington Territory, and any other bands of non-reservation Indians now belonging to the Colville Indian Agency, may be removed to the Coeur

d'Alene Reservation by the United States, on such terms as may be mutually agreed on by the United States and any such tribes or bands.

ARTICLE 5.

In consideration of the foregoing cession and agreements, it is agreed that the Coeur d'Alene Reservation shall be held forever as Indian land and as homes for the Coeur d'Alene Indians, now residing on said reservation, and the Spokane or other Indians who may be removed to said reservation under this agreement, and their posterity: and no part of said reservation shall ever be sold, occupied, open to white settlement, or otherwise disposed of without the consent of the Indians residing on said reservation.

ARTICLE 6.

And it is further agreed that the United States will expend for the benefit of said Coeur d'Alene Indians the sum of one hundred and fifty thousand dollars, to be expended under the direction of the Secretary of the Interior, as follows: For the first year, thirty thousand dollars, and for each succeeding year for fifteen years, eight thousand dollars. As soon as possible after the ratification of this agreement by Congress, there shall be erected on said reservation a saw and grist mill, to be operated by steam, and an engineer and miller employed, the expenses of building said mill and paying the engineer and miller to be paid out of the funds herein provided. The remaining portion of said thirty thousand dollars, if any, and the other annual payments shall be

expended in the purchase of such useful and necessary articles as shall best promote the progress, comfort, improvement, education, and civilization of said Coeur d'Alene Indians, parties hereto.

ARTICLE 7.

It is further agreed that if it shall appear to the satisfaction of the Secretary of the Interior that in any year in which payments are to be made as herein provided said Coeur d'Alene Indians are supplied with such useful and necessary articles and do not need the same, and that they will judiciously use the money, then said payment shall be made to them in cash.

ARTICLE 8.

It is further agreed that any money which shall not be used in the purchase of such necessary articles or paid over, as provided in article seven, shall be placed in the Treasury of the United States to the credit of the said Coeur d'Alene Indians, parties hereto, and expended for their benefit, or paid over to them, as provided in the foregoing articles.

ARTICLE 9.

It is further agreed that in the purchase for distribution of said articles for the benefit of said Indians the wishes of said Indians shall be consulted as to what useful articles they may need, or whether they need any at all, and their wishes shall govern as far as it is just and proper.

ARTICLE 10.

It is further agreed that in the employment of engineers, millers, mechanics, and laborers of every kind, preference shall be given in all cases to Indians, parties hereto, qualified to perform the work and labor, and it shall be the duty of all millers, engineers, and mechanics to teach all Indians placed under their charge their trades and vocations.

ARTICLE 11.

It is further agreed that in addition to the amount heretofore provided for the benefit of said Coeur d'Alene Indians the United States, at its own expense, will furnish and employ for the benefit of said Indians on said reservation a competent physician, medicines, a blacksmith, and carpenter.

ARTICLE 12.

In order to protect the morals and property of the Indians, parties hereto, no female of the Coeur d'Alene tribe shall be allowed to marry any white man unless, before said marriage is solemnized, said white man shall give such evidence of his character for morality and industry as shall satisfy the agent in charge, the minister in charge, and the chief of the tribe that he is a fit person to reside among the Indians; and it is further agreed that Stephen E. Liberty, Joseph Peavy, Patrick Nixon, and Julien Boutelier, white men who have married Indian women and with their families reside on the Coeur d'Alene Reservation, are permitted to remain thereon,

they being subject, however, to all laws, rules, and regulations of the Commissioner of Indian Affairs applicable to Indian reservations.

ARTICLE 13.

It is further agreed and understood that in consideration of the amount expended in buildings and other improvements on said Coeur d'Alene Reservation for religious and educational purposes by the De Smet Mission, and valuable services in the education and moral training of children on said reservation, and in consideration that the Indians, parties hereto, have donated for said purposes one section of land on which is situated the boys' school, one section on which is situated the girl's school, and one section of timbered land for use of the schools, that said De Smet Mission and its successors may continue to hold and use said three sections of land and the buildings and improvements thereon so long as the same shall be used by said De Smet Mission and its successors for religious and educational purposes.

ARTICLE 14.

This agreement shall not be binding on either party until ratified by Congress.

In testimony whereof the said John V. Wright, Jared W. Daniels, and Henry W. Andrews, on the part of the United States, and the chiefs, headmen, and other adult Indians, on the part of the Indians, parties hereto, have hereunto set their hands and affixed their seals.

Done at De Smet Mission on the Coeur d'Alene Reservation, in the Territory of Idaho, on this the twenty-sixth day of March, in the year of our Lord one thousand eight hundred and eighty-nine.

SEC. 20. That the following agreement entered into with the said Coeur d'Alene Indians by Benjamin Simpson, John H. Shupe, and Napoleon B. Humphrey, Commissioners on the part of the United States, signed by said Commissioners and by said Andrew Seltice, Chief, and others, on the part of said Indians, which agreement bears date September ninth, eighteen hundred and eighty-nine, and is now on file in the Interior Department, is hereby accepted, ratified, and confirmed, and is in the following words, to wit:

AGREEMENT.

This agreement, made pursuant to an item of an Act of Congress, namely; Section 4 of the Indian appropriation act, approved March two, eighteen hundred and eighty-nine, (25 Stat., 1002), by Benjamin Simpson, John H. Shupe, and Napoleon B. Humphrey, duly appointed commissioners on the part of the United States, parties of the first part, and the Coeur d'Alene tribe of Indians, now residing on the Coeur d'Alene Reservation in the Territory of Idaho, by their chiefs, headmen, and other male adults whose names are hereunto subscribed, parties of the second part witnesseth:

ARTICLE 1.

For the consideration hereinafter named the said Coeur d'Alene Indians hereby cede, grant, relinquish, and quitclaim to the United States, all the right, title, and claim which they now have, or ever had, to the following-described portion of their reservation, to wit: Beginning at the northeast corner of the said reservation, thence running along the north boundary line north sixty-seven degrees twenty-nine minutes west to the head of the Spokane River; thence down the Spokane River to the northwest boundary corner of the said reservation; thence south along the Washington Territory line twelve miles; thence due east to the west shore of the Coeur d'Alene Lake; thence southerly along the west shore of said lake to a point due west of the mouth of the Coeur d'Alene River where it empties into the said lake; thence in a due east line until it intersects with the eastern boundary line of the said reservation; thence northerly along the said east boundary line to the place of beginning.

ARTICLE 2.

And it is further agreed, in consideration of the above, that the United States will pay to the said Coeur d'Alene tribe of Indians the sum of five hundred thousand dollars, the same to be paid to the said Coeur d'Alene tribe of Indians upon the completion of all the provisions of this agreement.

ARTICLE 3.

It is further agreed that the payment of money aforesaid shall be made to the said tribe of Indians pro rata or share and share alike for each and every member of the said tribe as recognized by said tribe now living on said reservation.

ARTICLE 4.

It is further agreed and understood that this agreement shall not be binding on either party until the former agreement now existing between the United States by the duly-appointed commissioners and the said Coeur d'Alene tribe of Indians, bearing date March twenty-sixth, eighteen hundred and eighty-seven, shall be duly ratified by Congress; and in the event of the ratification of the aforesaid agreement of March twenty-sixth, eighteen hundred and eighty-seven, then this agreement to be and remain in full force and effect but not binding on either party until ratified by Congress. In witness whereof the said Benjamin Simpson, John H. Shupe, and Napoleon B. Humphrey, on the part of the United States, and the chiefs, headmen, and other adult male Indians, on the part of the Indians, parties hereto, have hereunto set their hands and affixed their seals.

Done at De Smet Mission, on the Coeur d'Alene Reservation, in the Territory of Idaho, this the 9th day of September, in the year of our Lord one thousand eight hundred and eighty-nine.

SEC. 21. That for the purpose of carrying into effect the provisions of said two agreements with said Coeur

d'Alene Indians there are hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, in the manner and for the purpose as hereinafter specifically stated the following sums, to wit: For the first installment of one hundred and fifty thousand dollars, as provided for in article six of the first of said agreements, thirty thousand dollars, to be expended for the building and erection on said Coeur d'Alene Indian Reservation of a saw and grist mill, to be operated by steam, and for the payment of the wages of the engineer and miller to be employed in said mill, respectively, the remaining portion of said thirty thousand dollars, if any, to be expended in the purchase of such useful and necessary articles as shall best promote the progress, comfort, improvement, education, and civilization of said Coeur d'Alene Indians, all of said articles to be purchased, and said engineer and miller to be employed as near as may be in strict conformity with articles nine and ten of the first of said agreements. And for the purpose of meeting the requirements of articles two and three of the second agreement aforesaid the sum of five hundred thousand dollars is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, to be paid by the United States to the said Coeur d'Alene tribe of Indians upon their compliance with all the provisions of the said second agreement hereinbefore recited, the same to be paid to the said tribe of Indians pro rata, or share and share alike, for each and every member of the said tribe as recognized by said tribe now living on said reservation.

SECTION 22. That all lands so sold and released to the United States, as recited or described in both of said agreements, and not heretofore granted or reserved from

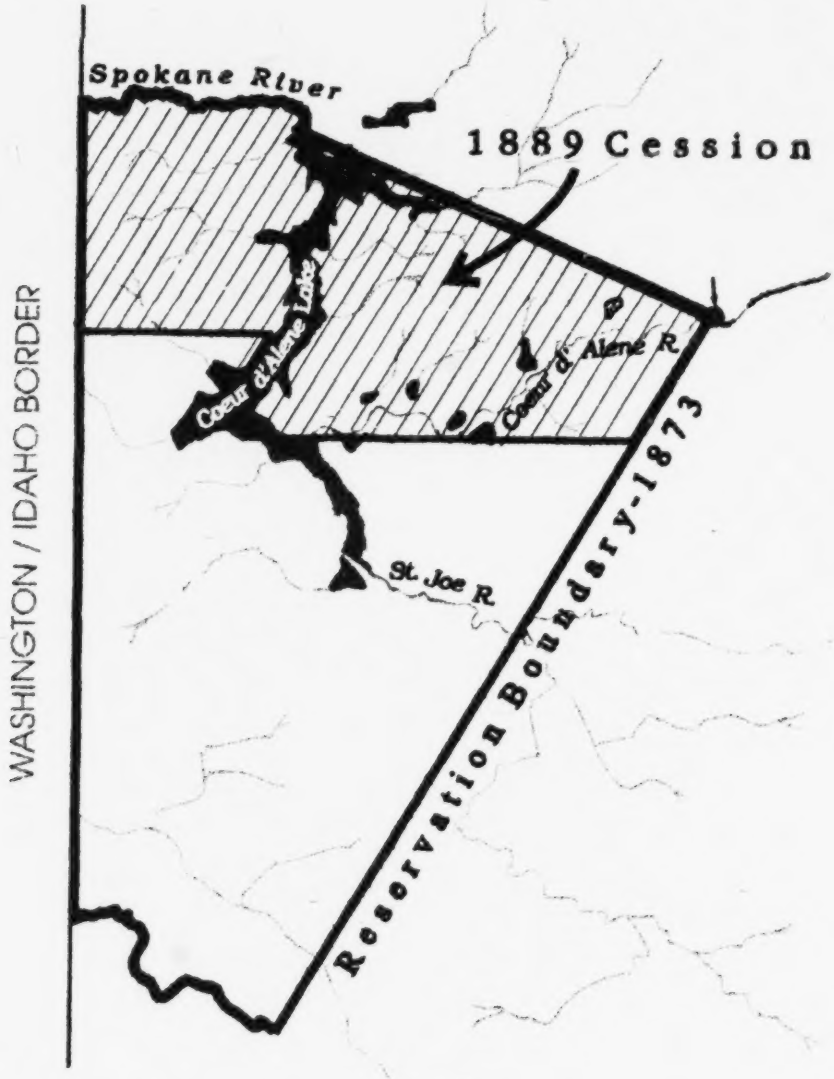
entry or location, shall, on the passage of this act, be restored to the public domain, and shall be disposed of by the United States to actual settlers only, under the provisions of the homestead law, except section twenty-three hundred and one of the Revised Statutes of the United States, which shall not apply, and under the law relative to town sites or to locators or purchasers under the mineral laws of the United States: *Provided*, That each settler or purchaser under and in accordance with the provisions of said homestead act, shall pay to the United States, for the land so taken by him, in addition to the fees provided by law, and within five years from the date of the first original entry, the sum of one dollar and fifty cents per acre, one-half of which shall be paid within two years; but the rights of honorably discharged Union soldiers and sailors, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes of the United States shall not be abridged, except as to the said sum to be paid as aforesaid: *Provided further*, That the Secretary of the Interior shall cause to be surveyed for and patented to Frederick Post, upon his making final proof of all thereof before the register and receiver of the proper United States land office, and to the satisfaction of the Commissioner of the General Land Office and Secretary of the Interior, and paying therefor two dollars and fifty cents per acre and the cost of making such survey of such portion of said reservation as is recited in the agreement in word and figures as follows, to wit:

"Know all men by these presents that I, Andrew Seltice chief of the Coeur d'Alene Indians, did on the first day of June, A. D. eighteen hundred and seventy-one,

with the consent of my people, when the country on both sides of the Spokane River belonged to me and my people, for a valuable consideration sell to Frederick Post the place now known as Post Falls, in Kootenai County, Idaho, to improve and use the same (water-power); said sale included all three of the river channels and islands, with enough land on the north and south shores for water-power and improvements; and have always protected the said Frederick Post, for eighteen years, in the rights there and then conveyed, and he has always done right with me and my people. We, the chiefs of the Coeur d'Alenes, have signed articles of agreement with the Government to sell the portion of the reservation joining Post Falls, in which we have excepted the above-prescribed rights, before conveyed to Frederick Post, and no Indian and no white man except Frederick Post have any rights on the above-described lands and river channels; the said Frederick Post has fulfilled all of his agreements with me and my people by improving the water-power and building mills at great expense, and I hereby authorize him to build a house and take full possession of the above-described lands on the reservation side, so that when the treaty is confirmed he may have full possession and protection of the Government in the same.

"Given under my hand and seal this 16th day of Sept'r., A. D. 1889.

his
"ANDREW x SELTICE.
mark.


Spokane River
1889 Cession
Coeur d'Alene Lake
Coeur d'Alene R.
St. Joe R.
Reservation Boundary-1873
WASHINGTON / IDAHO BORDER

(3)

No. 00-189

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

STATE OF IDAHO,

Petitioner,

v.

UNITED STATES OF AMERICA
AND COEUR d'ALENE TRIBE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENT COEUR D'ALENE TRIBE

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Respondent Coeur d'Alene Tribe ("Tribe") submits this brief in opposition to the State of Idaho's petition for a writ of certiorari. Under Rules 15.3 and 24.2, the Tribe is not required to set forth threshold matters and thus can proceed directly to demonstrating why the petition should be denied.

REASONS FOR DENYING THE PETITION

I. THE COURT OF APPEALS CORRECTLY DECIDED THE CASE UNDER THIS COURT'S CONTROLLING PRECEDENTS OF *MONTANA*, *UTAH*, AND *ALASKA*.

The primary basis for Idaho's petition is its insistence, stated several different ways, that the court of appeals' decision conflicts with decisions of this Court. *See* Pet. 16-26. This assertion is incorrect. As set forth in this section, the decision below squarely applies this Court's precedents to the particular facts of this case.

A. The Court Of Appeals Properly Determined That Congress Intended To Defeat State Title To The Submerged Lands By Recognizing And Acknowledging The Coeur d'Alene Reservation Which It Knew Included Submerged Lands.

The court of appeals correctly decided this case under this Court's controlling precedents of *Montana v. United States*, 450 U.S. 544 (1981), *Utah Div. of State Lands v. United States*, 482 U.S. 193 (1987), and *United States v. Alaska*, 521 U.S. 1 (1997). The court of appeals recognized that under this "trilogy of decisions, [which] provides the framework for analyzing whether a state's presumptive title to submerged lands within its borders has been defeated," there is a "two-prong test" (first set forth in *Utah*). Pet. App. 11-12. Specifically, the court stated, "the question before us is 'whether the United States intended to include submerged

lands within the [reservation] and to defeat [Idaho's] title to those lands.'" Pet. App. 12 (quoting *Alaska*, 521 U.S. at 36).

The court of appeals was required to address only one aspect of this test. Idaho did not dispute the first prong, which asks whether the federal government intended to include the submerged lands at issue within the Tribe's reservation. In the words of the court of appeals, "[f]or purposes of this appeal, the State concedes that the 1873 executive order was intended to reserve title to the submerged lands for the benefit of the Tribe." Pet. App. 4 n. 3; *see also* Pet. App. 10, 11, 13, 15 n. 9, 16, 17 (similarly noting and relying on Idaho's concession of this point). The court of appeals therefore "focus[ed] on the second prong–whether Congress demonstrated an intent to defeat the State's title to the submerged lands." Pet. App. 13.

The court of appeals carefully followed the guidelines of *Alaska* in answering this question in the affirmative. *Alaska* held that this second prong of the *Utah* test–intent to defeat a future state's title–was satisfied when Congress knew that "the President had construed his reservation authority to extend to submerged lands and had exercised that authority to set aside uplands and submerged lands" in the reservation, and Congress "explicitly recognize[d]" the reservation after it knew the reservation included the submerged lands. *Alaska*, 521 U.S. at 44, 45. As the court of appeals indicated, the following is the critical portion of this most recent precedent from this Court:

> "[T]here would have been no barrier to Congress retaining a petroleum reserve, including submerged lands, at the point of Alaska's statehood, provided it satisfied *Utah['s]* . . . requirements of demonstrating a clear intent to include submerged lands within the Reserve's scope and a clear intent to defeat Alaska's title. *It follows that Congress could achieve the same result by explicitly recognizing, at the point of Alaska's*

> *statehood, an executive reservation that clearly included submerged lands.*"

Pet. App. 13 (quoting *Alaska*, 521 U.S. at 44) (emphasis added). It is this language in *Alaska* that supplied the court of appeals with the standard it applied to the facts of this case. *See* Pet. App. 13-23. Contrary to petitioner's suggestions, it is on the basis of this specific guidance from this Court that the court of appeals was required to assess whether Congress met the requirement of "act[ing] affirmatively to defeat state title to submerged lands." Pet. 19-22 (quoted material at 20).[1]

Both the court of appeals and district court carefully applied *Alaska*'s approach in concluding that Congress had intended to defeat the future state's title. *See* Pet. App. 19-25 (court of appeals), 68-82 (district court). The court of appeals first noted that this second prong of intent to defeat title had been satisfied in *Alaska* where Congress had fashioned its actions in the Alaska Statehood Act around its recognition that "a petroleum reserve [had been] created by executive order 35 years prior to Alaska's statehood." Pet. App. 14 (citing *Alaska*, 521 U.S. at 32-46). This type of congressional action was sufficient, according to this Court, to preserve federal title to the reserve and to defeat the future state's

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[1] This aspect of *Alaska* also is a complete response to petitioner's separate argument that the court of appeals erred when it "expressly declined to examine the purpose of the reservation as understood by Congress." Pet. 22-26 (quoted material at 22). Congress's intent to defeat a future state's title can be established, as *Alaska* demonstrates, by its ratification of the Executive's previous reservation of submerged lands. *See Alaska*, 521 U.S. at 43-45, 52-57. Further, inclusion of the submerged lands in the Reservation was necessary to accomplishing the United States' purposes here because it was part of the consideration demanded by the Tribe in exchange for acceding to the United States' other goals. Pet. App. 15, 17, 61, 65, 74-76. Finally, both the court of appeals, Pet. App. 18 n.11, and the district court, Pet. App. 81 n.25, correctly analyzed why such congressional re-examination of the "purpose of the reservation," Pet. 22, is not necessary.

claim. The court of appeals here then explained that, "[i]n this case, several similar factors counsel the same result." Pet. App. 15. In particular, the court pointed to "the series of congressional actions taken in the late 1880s[,] ascertaining that the Executive construed the [1873 Coeur d'Alene] reservation to include submerged lands and authorizing negotiations to recover whatever portion of the lands the Tribe was willing to sell." *Id.* This series of actions "shows that Congress acknowledged that beneficial ownership of the lands had already passed to the Tribe." Pet. App. 15-16. As the court of appeals succinctly stated in rejecting one of Idaho's contentions on this point, "what matters [under the foregoing block quotation from *Alaska*] . . . is Congress' awareness that the 1873 Reservation included submerged lands, an issue about which there can be no doubt given the response to the 1888 resolution."[2] Pet. App. 19.

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[2] This 1888 resolution was described by the court of appeals as follows: "[T]he Senate . . . pass[ed] a resolution in 1888 inquiring of the Secretary of the Interior about the boundaries of the Tribe's reservation and 'whether such area includes any portion, and if so, about how much of the navigable waters of Lake Coeur d'Alene, and of Coeur d'Alene and St. Joseph Rivers.' S. Res. Mis. Doc. No. 36, 50th Cong. (1888). The Senate also sought advice about 'whether it is advisable to release any of the navigable waters aforesaid from the limits of such reservation.' *Id.* Two weeks later, the Secretary replied, stating that the 1873 reservation included the submerged lands at issue and attaching a report by the Commissioner [of Indian Affairs]; this report informed Congress that '*the reservation appears to embrace all the navigable waters of Lake Coeur d'Alene*, except a very small fragment cut off by the north boundary of the reservation' and that portions of the Coeur d'Alene and St. Joseph Rivers flowed through the reservation. Letter from the Secretary of the Interior, S. Ex. Doc. No. 76, 50th Cong., 1st Sess. 3 (1888). The Commissioner opined that '*changes could be made in the boundaries for the release of some or all of the navigable waters*' and that it would be 'an easy matter' to negotiate a cession of the reservation, 'including all or a portion of the navigable waters,' once the 1887 agreement had been ratified. *Id.* at 2." Pet. App. 6-7 (emphasis added).

The court of appeals went on to determine that Congress recognized and acknowledged the Coeur d'Alene Reservation in two pre-statehood statutes passed *after* Congress knew that the Reservation included the submerged lands at issue here. The first such pre-statehood statute was the 1888 railroad right-of-way statute. Act of May 30, 1888, 25 Stat. 160. This was a grant of a right-of-way through the Reservation, conditioned on Tribal approval and payment to the Tribe by the railroad. *See id.*; Pet. App. 21 n.13. The second such pre-statehood statute was the 1889 statutory authorization to enter into negotiations for a possible cession by the Tribe to the United States of additional portions of their Reservation. Act of March 2, 1889, 25 Stat. 980, 1002. The court of appeals explained as follows:

> Although Congress had the opportunity and the power to repudiate the executive reservation and the 1887 agreement, it did not do so. Instead, in 1889 it took affirmative action, choosing to authorize negotiations–with few limitations aside from an instruction to acquire non-agricultural lands–"for the purchase *and release* by said tribe of such portions of *its reservation* . . . as such tribe *shall consent to sell*" (emphasis added). Act of March 2, 1889, 25 Stat. 980, 1002. The express reference to the reservation as *the Tribe's reservation*, explicit recognition that the choice to sell was the Tribe's, and reference to *tribal release* of portions of *its reservation* all manifest an awareness and acceptance by Congress of the boundaries of the 1873 reservation–boundaries that included submerged lands. This series of events indicates that Congress accepted the Secretary's advice to leave any cession up to negotiations. Indeed, the fact that Congress decided to make its authorization open-ended reinforces the district court's conclusion that Congress recognized and accepted the Tribe's beneficial ownership of all lands–including submerged lands–within the 1873 reservation; it also shows Congress's recognition of the uncertainty of

> regaining any land at all, and its particular desire to recover whatever submerged lands it could.

Pet. App. 21-23 (emphasis in original, footnote omitted). What is particularly striking about the 1889 negotiation authorization statute is that it was not merely a general congressional recognition of the Reservation.[3] Rather, as the court of appeals noted, "[t]he events surrounding the [1889 negotiation] authorization [statute] clearly show that the main purpose of the new negotiations was to regain from the Tribe whatever *submerged lands* it was willing to sell." Pet. App. 22 n.14 (emphasis added).

In short, the court of appeals properly determined that Congress recognized and acknowledged the Coeur d'Alene Reservation after it knew the Reservation included the submerged lands. On the basis of this analysis, the court concluded that Congress "'otherwise [than by a definite declaration] made very plain' its intention regarding the submerged lands" in a manner sufficient under this Court's precedents to defeat a future state's title. Pet. App. 23 (quoting *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926)) (internal citation omitted); *see also* Pet. App. 12 (quoting full phrase from *Holt State Bank*). In this regard, it is important to recall that "[n]othing in *Alaska* requires that congressional action take the form of explicit congressional ratification of an agreement reserving or conveying title to particular submerged lands." Pet. App. 12. It rather is enough that "[w]ith the 1887 agreement and the response to the 1888 resolution before it, Congress, fully aware of the boundaries of the 1873 reservation and the extent of the submerged lands that were within it, sought to modify the boundaries described in the agreement–and it sought to do so

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[3] The railroad right-of-way act in this case was a general congressional recognition, just as the appropriation statutes were general recognitions of the Cherokee Reservation in *Holden v. Joy*, 17 Wall. 211 (1872), cited with approval in *Alaska*, 521 U.S. at 45.

via purchase rather than the simpler expedient of rejecting the executive reservation." Pet. App. 23. These congressional "actions show recognition and acceptance of the passage of beneficial ownership to the Tribe, for [Congress] sought to *regain* as much submerged land as possible." *Id.* Indeed, all this is more than enough: As the court of appeals noted, "there is significantly more evidence of congressional intent with regard to the submerged lands in this case than with regard to the wildlife refuge in *Alaska*," where this Court also held that Congress intended to defeat a future state's title. Pet. App. 20 n. 12.

B. The Idaho Admission Bill Is An Additional Recognition And Acknowledgment Of The Coeur d'Alene Reservation By Congress At The Point Of Statehood And After It Knew The Reservation Included The Submerged Lands.

The court of appeals ended its inquiry after it determined that Congress had intended to defeat state title to the submerged lands because Congress had recognized and acknowledged the Reservation in the 1888 and 1889 statutes. The court found that it was not necessary to "rel[y] on the disclaimer clause in the Idaho Constitution" as a third congressional recognition and acknowledgment. Pet. App. 23.[4] The court noted that "t[o] the extent the clause is considered at all, however, it weighs in favor of the conclusion we have reached, for it disclaims title to land 'held by' Indians." Pet. App. 24.

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[4] The court of appeals also found it unnecessary to address the Tribe's ownership of the submerged lands under several other theories. *See* Pet. App. 13. In the event that this Court reversed the court of appeals, it presumably would remand so that that court could address these arguments in the first instance. *See Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 115 n.5 (1998).

The provisions of the Idaho Constitution, ratified by Congress in the Idaho Admission Bill, are similar to those in the Alaska Statehood Act in that both provide for federal ownership and jurisdiction over certain lands. To take the instant case first, the petitioner, in its Constitution, disclaimed ownership of "all right and title . . . to all lands . . . held by any Indians or Indian tribes." Idaho Const., art. XXI, § 19, *quoted in* Pet. App. 23 n.15. This document also provided that "until the title thereto shall have been extinguished by the United States, [all lands held by any Indians or Indian tribes] shall be subject to disposition by the United States," and that "said *Indian lands* shall remain under the absolute jurisdiction and control of the Congress of the United States." Idaho Const., art. XXI & § 19 (emphasis added). This specific disclaimer of "Indian land" is particularly important because Article 5 of the 1887 Agreement with the Tribe (as well as the later ratification statute, Act of Mar. 3, 1891, 26 Stat. 989, 1086, Pet. App. 89) specifically denominated the Reservation "Indian lands." In these circumstances, Idaho specifically disclaimed ownership and jurisdiction over the Reservation, which everyone knew included the submerged lands. These state constitutional disclaimers were then "accepted, ratified and confirmed" by Congress in the Idaho Admission Bill. Act of July 3, 1890, 26 Stat. 215 ch. 656. This is a clear expression of Congress's intent to defeat state title to the submerged lands–indeed, Congress's acceptance, ratification and confirmation of Idaho's disclaimer of ownership and acceptance of federal regulation are essentially the same as the provisions in the Alaska Statehood Act that were relied upon in *Alaska* as to both the oil reserve and the wildlife refuge at issue there.[5] To the extent there is a difference, it is

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[5] In Alaska the recognition of federal ownership and regulatory control over the reservations was contained in the Alaska Statehood Act, Pub. L. 85-508, 72 Stat. 347.

Another similarity to the wildlife refuge in *Alaska* is that prior to statehood Congress was provided with a map that clearly showed the

that, in a sense, this case is even stronger than *Alaska* because here it is the petitioner itself that did the disclaiming, and Congress "accepted, ratified and confirmed" that disclaimer. 26 Stat. 215 ch. 656. This is also an entire response to petitioner's argument that "[a]n affirmative intent to defeat state title to submerged lands within federal reservations requires that Congress make plain its intent that federal ownership would continue *after* statehood." Pet. 20. As set forth above, Congress *did* make plain this intent.

In short, Congress's ratification of the Idaho Constitution in the Idaho Admission Bill constitutes a third recognition and acknowledgment of federal/tribal ownership and federal control that could properly have been relied upon by the court of appeals as an additional means of determining that Congress had intended to defeat state title.

C. Post-Statehood Events Demonstrate That Congress Intended That State Title To The Submerged Lands Be Defeated And Tribal Ownership Continue After Statehood.

The Court of Appeals noted that several post-statehood events also "reflect [Congress's] recognition and confirmation that submerged lands had passed to the Tribe prior to Idaho's statehood." Pet. App. 25-27 (quoted material at 25); *see also* Pet. App. 25 n.17 (citing *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89-90 (1918), to refute Idaho's argument that consideration of post-statehood events is forbidden in judicial effort to determine Congress's pre-statehood intent). Specifically, the court of appeals reviewed the post-statehood cession of the so-called Harrison Strip in 1894. This cession included a "portion of the lake," which

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submerged lands in the reservation. *See Alaska*, 521 U.S. at 56. In this case the map provided to Congress showed the reservation boundary specifically crossing the lake. S. Ex. Doc. No. 14, 51st Cong., 1st Sess. (1889); *see infra* Appendix to this Opposition.

"would not have been necessary absent a contemporary understanding that the Tribe had beneficial ownership of the bed." Pet. App. 26. This Harrison Cession thus is a "post-statehood acknowledgment of tribal ownership of the lake bed" and a "memorialization of prior events." *Id.*

Congress's pre-statehood intent to defeat state title to the submerged lands is reflected in another post-statehood event as well. In the same statute that ratified the 1887 and 1889 Agreements with the Tribe, Congress directed that a patent to certain submerged lands be given to one Frederick Post. Act of March 3, 1891, 26 Stat 989, 1027 (Pet. App. 87, 97). Specifically, chapter 22 of the statute approving the 1887 and 1889 Coeur d'Alene Agreements directed that "the Secretary of the Interior shall cause to be surveyed for and patented to Frederick Post . . . . *such portion of said [Coeur d'Alene] reservation* as is recited in the agreement in word and figures as follows. . . . includ[ing] *all three of the river channels* and islands, with enough land on the north and south shores for water power and improvements." *Id.* (Pet. App. 97-98) (emphasis added). This is further indication that Congress intended that tribal ownership of the submerged lands continue *after* statehood and state title to the submerged lands be defeated. If the submerged lands had passed to petitioner at statehood in 1890, Congress could not have directed in the 1891 statute that the "three river channels" be conveyed to Frederick Post. *Id.*

In short, these post-statehood events demonstrate that Congress intended that state title to the submerged lands be defeated and tribal ownership continue after statehood.[6]

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[6] As the foregoing sections demonstrate, before a court could conclude that Congress did *not* intend to defeat a future state's title here (as petitioner urges), much more would have to be considered than the one statute identified by petitioner's Question Presented (*viz.*, the 1889 negotiation statute). *See* Pet i. That statute, as the court of appeals demonstrated, adequately discloses under this Court's precedents that

D. Congress's Intent To Defeat Future State Title Cannot Be Disproved By Its Deferral Of Approval Of Agreements With The Coeur d'Alene Tribe Until After Statehood.

Unable to demonstrate a conflict with this Court's controlling precedents, the petitioner ultimately makes a case-specific argument that "[t]he court of appeals' decision ignores the fact that Congress purposefully deferred its ratification of the Reservation until after statehood." Pet. 26-29 (quoted material at 26). The petitioner's only support for

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Congress *did* intend to defeat a future state's title here and thus that title to the submerged lands in question never passed to Idaho. Before reaching the contrary conclusion, on the other hand, on the ultimate question of whether Idaho received title to the lands at the time of statehood, one would have to confront not only the 1889 statute, but other statutes that, in respondent's view, are also sufficient under this Court's precedents to affirm the judgment of the court of appeals. Specifically, Congress's pre-statehood enactment of the railroad right-of-way statute (*see supra* p. 5) and its statute, contemporaneous with statehood, that "accepted, ratified and confirmed" the Idaho Constitution's eternal ("forever") "disclaim[er] [of] all right and title . . . to all lands . . . owned or held by any Indians or Indian tribes" and that constitution's acknowledgment that "said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States" (*see supra* p. 8 (quoting Act of July 3, 1890, 26 Stat. 215, and Idaho Const. Art. XXI, § 19)), are themselves sufficient under this Court's decision in *Alaska* to demonstrate Congress's intent to defeat a future state's title. *See supra* pp. 2-3 (block quotation of *Alaska*, 521 U.S. at 44). Further, Congress's after-statehood statute conveying to Frederick Post part of the reservation that had been yielded back to the government also reflects Congress's pre-statehood intent–a concept that the court of appeals, in discussing the post-statehood Harrison Cession, recognized was appropriate under this Court's decision in *Alaska Pacific Fisheries v. United States*, 248 U.S. at 89-90. *See supra* pp. 9-10. In these circumstances, petitioner not only has failed to demonstrate that the court of appeals' ruling conflicts with this Court's precedents (as Parts I.A through I.C of this opposition demonstrate that it does it not), but also has inadequately set forth the full range of considerations that would have to underlie any conclusion that the court of appeals' ruling should be outright reversed. *See also supra* p. 7 n. 4.

this proposition is Congress's requirement that the 1887 and 1889 Agreements with the Tribe would not be in effect until ratified by Congress. Contrary to petitioner's implication throughout this argument, the requirement of congressional ratification was nothing unique to the Coeur d'Alene Agreements.

It was standard practice for Congress to require that agreements with Indian tribes be returned to Congress for ratification. Senate ratification of any treaties with Indian tribes had always been required. *See* U.S. Const. art. 2, § 2, cl. 2. In 1871, because Congress discontinued the use of treaties with Indian tribes, it instead required that agreements be ratified by both the House and Senate. *See* Cohen, *Handbook of Federal Indian Law* 107 (1982 ed.). Thereafter, agreements negotiated with Indian tribes pursuant to congressional authorization routinely required congressional ratification. The 1886 congressional authorization, for example, was for negotiations with not only the Coeur d'Alene Tribe but also numerous other tribes in the Dakota, Montana, Idaho, and Washington territories. Act of May 15, 1886, 24 Stat. 44. Congressional approval was required of *all* the resulting agreements. *See id.* ("no agreement made shall take effect until ratified by Congress"). So too did Congress require congressional approval of other agreements that it authorized be negotiated.[7] The requirements of congressional

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[7] Agreement with Ute Indians, Colorado, Sept. 13, 1873, Act of Apr. 23, 1872, 17 Stat. 55 (authorized), Act of Apr. 29, 1874, 18 Stat. 36 (ratified); Agreement with Eastern Band of Shoshone Indians, Sept. 26, 1872, Act of June 1, 1872, 17 Stat. 214 (authorized), Acts of June 22, 1874, Dec. 15, 1874, 18 Stat. 146 at 166, 18 Stat. 291 (ratified); Agreement with Sioux, N. Arapahoe and Cheyenne Indians, Sept. 26, 1876, Acts of Aug. 15, 1876, Apr. 10, 1869, 19 Stat. 176 at 197, 16 Stat. 13 at 40 (Sec. 4 & 5) (authorized), Act of Feb. 28, 1877, 19 Stat. 254 (ratified); Agreement with Muscogee (or Creek) Nation of Indians, Jan. 19, 1889, Act of Mar. 3, 1885, 23 Stat. 362 at 384 (authorized), Act of Mar. 1, 1889, 25 Stat. 757 (ratified); Agreement with Indians at Fort

ratification in the 1886 and 1889 negotiation authorization statutes had absolutely nothing to do specifically with the submerged lands. It was simply the normal practice of the day replacing the requirement of Senate treaty ratification.

In short, no aspect of this general requirement that all agreements with Indian tribes be returned to Congress for approval can be used to cast doubt on the court of appeals' conclusion that congressional intent to defeat future state title

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Berthold Agency, Dec. 14, 1886, Act of May 15, 1886, 24 Stat. 29 at 44 (authorized), Act of Mar. 3, 1891, 26 Stat. 989 at 1032 (ratified); Agreement with Spokane Indians, Mar. 18, 1887, Act of May 15, 1886, 24 Stat. 29 at 44 (authorized), Act of Jul. 3, 1892, 27 Stat. 120 at 139 (ratified); Agreement with Gros Ventre, Piegon, Blood, Blackfeet and River Crow Indians, Montana, Dec. 28, 1886, Act of May 15, 1886, 24 Stat. 29 at 44 (authorized), Act of May 1, 1888, 25 Stat. 113 (ratified); Agreement with Nez Perce Indians, Idaho, May 1, 1893, Act of Feb. 8, 1887, 24 Stat. 388 at 389 (authorized), Act of Aug. 15, 1894, 28 Stat. 306 at 331 (ratified); Agreement with Cheyenne and Arapahoe Tribes of Indians, Oct. 1890, Act of Aug. 19, 1890, 26 Stat. 336 at 343 (authorized), Act of Mar. 3, 1891, 26 Stat. 989 at 1022 (ratified); Agreement with Crow Indians, Montana, Dec. 8, 1890, Act of Sept. 25, 1890, 26 Stat. 468 (authorized), Act of Mar. 3, 1891, 26 Stat. 989 at 1039 (ratified); Agreement with Yankton Sioux, Dec. 31, 1892, Act of Jul. 13, 1892, 27 Stat. 120 at 137 (authorized), Act of Aug. 15, 1894, 28 Stat. 306 at 314 (ratified); Agreement with Alsea & Other Indians on Siletz Reservation in Oregon, Oct. 31, 1892, Jul. 13, 1892, 27 Stat. 120 at 138 (authorized), Act of Aug. 15, 1894, 28 Stat. 306 at 326 (ratified); Agreement with Shoshone and Arapahoe Tribes of Indians, Wyoming, Apr. 21, 1896, Act of Aug. 15, 1894, 28 Stat. 286 at 306 (authorized), Act of Feb. 23, 1897, 30 Stat. 62 at 93 (ratified); Agreement with Indians of Fort Belknap Indian Reservation, Montana, Oct. 9, 1895, Act of Mar. 2, 1895, 28 Stat. 876 at 900 (authorized), Act of June 10, 1896, 29 Stat. 321 at 353 (ratified); Agreement with Indians of Blackfeet Indian Reservation, Montana, Sept. 26, 1895, Act of Mar. 2, 1895, 28 Stat. 876 at 900 (authorized), Act of Jun. 10, 1896, 29 Stat. 321 at 357 (ratified); Agreement with Indians of San Carlos Indian Reservation, Arizona, Feb. 25, 1896, Act of Mar. 2, 1895, 28 Stat. 894 (authorized), Act of Jun. 10, 1896, 29 Stat. 321 at 360 (ratified); Agreement with Shoshone and Bannock Indians of the Fort Hall Reservation, Idaho, Feb. 5, 1898, Jun. 10, 1896, 29 Stat. 341 (authorized), Jun. 6, 1900, 31 Stat. 672 (ratified).

to the submerged lands at issue here is disclosed by proper application of the specific test set forth in *Alaska* for determining such intent.

II. THERE IS NO CONFLICT WITH DECISIONS OF THE IDAHO SUPREME COURT OR AMONG THE CIRCUITS.

Petitioner asserts two additional bases for review of the court of appeals' decision. Neither has merit.

First, petitioner is simply incorrect in asserting that "[t]he court of appeals' decision presents irreconcilable conflicts with decisions of the Idaho Supreme Court." Pet. 14-16 (quoted material at 14). None of the four cases, decided over a span of 75 years, upon which petitioner relies to make out a conflict addresses ownership claims of the United States or the Tribe to Lake Coeur d'Alene.

Petitioner itself concedes that three of the cases "addressed situations arising outside the Coeur d'Alene reservation." Pet. 15. To take them in the order presented by petitioner, *Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085 (Idaho 1983), was a challenge by an environmental group on public trust doctrine grounds to petitioner's issuance of a marina permit on Lake Coeur d'Alene; *Erickson v. State*, 970 P.2d 1 (Idaho 1998), was an unsuccessful challenge to state ownership of submerged lands claimed to be upland prior to the water level's being raised by a hydroelectric dam built on the three river channels previously conveyed by Congress to Frederick Post (see *supra* p. 10 for a description of that conveyance); and *Bowman v. McGoldrick Lumber Co.*, 219 P. 1063 (Idaho 1923), was a dispute between a littoral property owner and a lumber company that was storing logs on Lake Coeur d'Alene abutting the property. No claim of federal or tribal lake ownership was involved in any of these cases.

The same is true of petitioner's fourth and final case, *West v. Smith*, 511 P. 2d 1326 (Idaho 1973), which was a dispute between the owner of a houseboat moored on Lake Coeur d'Alene and the littoral property owner regarding the right to moor the houseboat. While petitioner attempts to demonstrate that at least this case involves land also in dispute in the instant litigation (*see* Pet. 15-16 & n.8), petitioner cannot escape the fact that federal or tribal lake ownership was no more an issue in *West* than it was in the other three cases discussed above.

To the extent these cases say anything relevant to this case, it is only that they set forth unremarkable dicta to the effect that ordinarily "the 'State of Idaho holds title to the beds of all navigable bodies of water below the natural high water mark for the use and benefit of the public.'" Pet. 15 (quoting *Kootenai Environmental Alliance*, 671 P.2d at 1088). But no one in this litigation has ever doubted that proposition. This entire case has rather been about whether that ordinary rule does not apply because of the federal government's actions in the nineteenth century in ceding title to *particular* submerged lands to the Tribe before Idaho became a state.[8]

Second, petitioner also argues that this case should be reviewed even though there is no conflict between the circuits because "[o]utside the Ninth Circuit, state title to submerged lands within executive order reservations apparently has not been challenged." Pet. 17-18 (quoted material at 18). Petitioner suggests that the issue in this case is therefore "peculiar to States within the Ninth Circuit" and that these "unique circumstances [of] this case" accordingly support dispensing with the Court's ordinary principles governing grants of certiorari. Pet. 17.

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[8] That these cases say nothing to recommend petitioner's claim of ownership to the submerged lands over the Tribe's claim is presumably why petitioner elected to cite none of these cases to the court of appeals.

This argument rests on a fallacy. The issue in this case is *Congress's* intent to defeat state title to the submerged lands. It has nothing to do with whether the reservation was initially created by *executive order* (as it was here), by agreement between the Tribe and the executive branch, or by some other means. It is thus no surprise that, contrary to petitioner's suggestion, cases addressing aspects of the issue presented in this case–Congress's intent–have come to this Court from state courts and several circuits. *Holt State Bank* came from the Minnesota Supreme Court, *South Dakota v. Bourland* from the Eighth Circuit, *Alaska Pacific Fisheries* and *Montana* from the Ninth Circuit, and *Choctaw*, *Utah*, and *Cherokee* from the Tenth Circuit.[9] There is thus no basis for crediting the petitioner's argument that "conflicts with other circuits may never appear." Pet. 18.

III. OTHER ARGUMENTS OF PETITIONER AND ITS AMICI COUNTIES DO NOT WARRANT REVIEW.

Petitioner and its amici, Benewah and Kootenai Counties, make several other arguments in support of the petition. None is sufficient to warrant this Court's review.

First, petitioner suggests that *Alaska* provides no guidance in this case because "original jurisdiction decisions are not intended to provide national guidance or establish rules of general applicability." Pet. 18. No citation is offered to support remarkable suggestion. Petitioner is simply wrong. Original jurisdiction cases have established numerous rules of general applicability. It was in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), that this Court established the

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[9] *See United States v. Holt State Bank*, 270 U.S. 49 (1926); *South Dakota v. Bourland*, 508 U.S. 679 (1993); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918); *Montana v. United States*, 450 U.S. 544 (1981); *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970); *Utah Div. of State Lands v. United States*, 482 U.S. 193 (1987); *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700 (1987).

fundamental principle of American jurisprudence that the courts of the United States can review and void statutes that are inconsistent with the United States Constitution. It was in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), that the Court established the fundamental principle that Indian tribes are "domestic dependent nations" in a trust relationship with the United States. *Id.* at 17. It is unnecessary to list any of the many other examples of original jurisdiction cases that, like *Alaska* here, establish rules of general application and are properly looked to for national guidance.

Second, petitioner and its amici argue as a general theme that the petition should be granted and the court of appeals' decision reversed because the case involves submerged lands which are tied to the State's history, sovereignty, and public-trust doctrine. *See* Pet. 2-3, 12, 14-16; Amicus Br. 3-5, 8-10. Of course, in making these arguments, petitioner and its amici take no account of this Court's more balanced observation that, "[a]s the Tribe views the case, the lands are just as necessary, perhaps even more so, to its own dignity and ancient right." *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 287 (1997). In any event, petitioner specifically argues that the court of appeals' decision "upsets a century of State ownership." Pet. 2. In reality, the petitioner did not even claim ownership of any submerged lands for the first 25 years of statehood. As the federal district court in the state summarized in another case 67 years ago, at the time of statehood submerged lands under both *navigable* and non-navigable waters were owned by riparian landowners, not the petitioner: "Under the law of Idaho at the time of statehood, and when the patents were issued to the allottees, the riparian owner upon a stream, both navigable and non-navigable, takes title to the bed of the stream . . . ." *United States v. Ladley,* 4 F. Supp. 580, 582 (D. Idaho 1933); *accord Johnson v. Johnson*, 14 Idaho 561, 95 P. 499 (1908); *Lattig v. Scott*, 17 Idaho 506, 107 P. 47 (1910), *reversed on other grounds*, 227 U.S. 229 (1913); *Donovan-Hopka-Ninneman Co. v. Hope*

Lumber Mfg. Co., 194 F. 643, 649 (9th Cir. 1912) (applying rule to submerged lands underlying navigable lakes); *but cf. Callahan v. Price*, 26 Idaho 745, 146 P. 732 (1915) (overruling prior cases holding riparian or littoral landowners held title to mid-stream or lake). Furthermore, Idaho did not begin regulating encroachments on lakes in Idaho until 1974, *one year after* the Tribe first sought a determination of tribal ownership of Lake Coeur d'Alene. *In re the Application for License of the Washington Water Power Company*, Project No. 2545, Federal Power Commission (F.E.R.C.) (granting the Tribe intervention Sept. 14, 1973). Contrary to petitioner's assertion, submerged land ownership and regulation have no special place in Idaho history. Far from upsetting "a century of State ownership" (Pet. 2), the court of appeals has only quieted title which has been disputed for years.

Amici go so far as to suggest that the petition should be granted because it is appropriate for the Supreme Court to decide this, and apparently every, submerged lands case, simply given the implications for state sovereignty.[10] Amicus Br. 4-5. Amici's suggestion is unpersuasive. The case upon which amici rely for the proposition that it "best comports 'with the dignity of a state, that a case in which it was a party should be determined in the highest, rather than a subordinate, judicial tribunal of the Nation,'" Amicus Br. 2, 4-5 (quoting *United States v. Texas*, 143 U.S. 621, 643 (1892)), does not in any sense purport to govern the Court's discretionary determination whether to grant or deny

[10] Petitioner essentially shares this view with amici, for the question presented by petitioner is so narrow and specific to this litigation that it is inconceivable that a ruling from this Court would create a precedent that lent itself to anything approaching wide application. *See* Pet. i (stating that the question presented is "whether a defeat of state title to submerged lands is implied when Congress, in a pre-statehood act, authorizes cession negotiations with an Indian tribe for the purpose of removing submerged lands from the executive order reservation they occupy").

certiorari in this case. In the quoted material, as the Court took pains to make clear, this Court was merely explaining, in an original jurisdiction case, why *Congress* had decided, "under [then] existing statutes," to provide "*exclusive* jurisdiction" to the Supreme Court "of a suit by the United States against a State." *Texas*, 143 U.S. at 643 (emphasis added). By revising these jurisdictional statutes since the late nineteenth century, and thereby permitting suits such as the instant one to go forward in federal district court and subject to ordinary rules concerning appellate review by federal courts of appeals and this Court, Congress has made clear that it has reconsidered whether mandatory scrutiny by this Court is necessary to preserve "the dignity of a state." The Court has viewed the matter similarly: it frequently has denied certiorari in other submerged lands cases, both where claims of ownership as against the state were rejected by lower courts *and* where such claims were upheld.[11]

Finally, amici also express concern that the Tribe is regulating non-Indian use of the lake and river, implying that non-Indian use might be prohibited. Of course the Tribe is regulating use of the lake. Concern would be proper only if

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[11] *See, e.g., Moore v. United States*, 157 F.2d 760 (1946), *cert. denied*, 330 U.S. 827 (1947) (upholding tribal ownership of submerged lands); *Skokomish Indian Tribe v. France*, 320 F.2d 205 (9th Cir. 1963), *cert. denied*, 376 U.S. 943 (1964) (rejecting tribal ownership of submerged lands); *United States v. Alaska*, 423 F.2d 764 (9th Cir.), *cert. denied*, 400 U.S. 967 (1970) (upholding federal ownership of submerged lands); *Confederated Salish and Kootenai Tribes v. Namen*, 665 F.2d 951, *cert. denied*, 459 U.S. 977 (1982) (upholding tribal ownership of submerged lands); *United States v. Aranson*, 696 F.2d 654 (9th Cir. 1983), *cert. denied*, 464 U.S. 982 (1983) (rejecting tribal ownership of submerged lands but remanding to determine aboriginal title); *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251 (9th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984) (upholding tribal ownership of submerged lands); *Muckleshoot Indian Tribe v. Trans-Canada Enterprises*, 713 F.2d 455 (9th Cir. 1983), *cert. denied*, 466 U.S. 1049 (1984) (upholding tribal ownership of submerged lands).

the Tribe were *not* regulating such use. Even though this is an issue which was not raised below, it is appropriate to note that non-Indians *are* allowed to boat, fish, and maintain encroachments on these waters pursuant to reasonable regulations. Coeur d'Alene Tribe Code, ch. 20, 43, 44. More fundamentally, the doctrine of navigational servitude guarantees non-Indian use of waters in Indian reservations. This Court has already reached that conclusion:

> If the States themselves are subject to this servitude, we cannot conclude that [an Indian tribe]–though granted a degree of sovereignty over tribal lands–gained an exemption from the servitude simply because it received title to the riverbed interests. . . .
>
> . . . [T]he tribal interests at issue here simply do not include the right to be free from the navigational servitude.

United States v. Cherokee Nation of Oklahoma, 480 U.S. 700, 707-08 (1987). The Tribe is properly regulating the lake and allowing all to use it as required by navigational servitude.[12]

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[12] Amici's other arguments in defiance of this Court's precedents also do not support review. First, as for the claim that there is no "public exigency" or "international duty" justifying the defeat of state title to submerged lands (Amicus Br. 7-8), this Court made clear in *Alaska* that the "public exigency" and "international duty" language of earlier cases was only "congressional policy, not a constitutional obligation." *Alaska*, 521 U.S. at 40 (citing *Utah*, 482 U.S. at 197). Second, amici suggest that at the time in question Congress had a general policy calling for an end of tribal ownership of land. *See* Amicus Br. 2-3, 5-7. Even leaving aside amici's incomplete and therefore incorrect characterization of Congress's general policy, there can be no suggestion that such a policy or even the General Allotment (Dawes) Act of February 8, 1887, 24 Stat. 388, to which amici point as evidence of this policy, can control over the specific (including statutory) evidence of congressional intent that the court of appeals here explained was controlling under the *Utah-Alaska* test. *Cf. Guidry v. Sheet Metal Workers Nat. Pension Fund*, 493 U.S. 365, 376 (1990) ("specific statute will not be controlled or nullified by a general

In short, none of these additional arguments of petitioner or its amici forms a basis for granting review.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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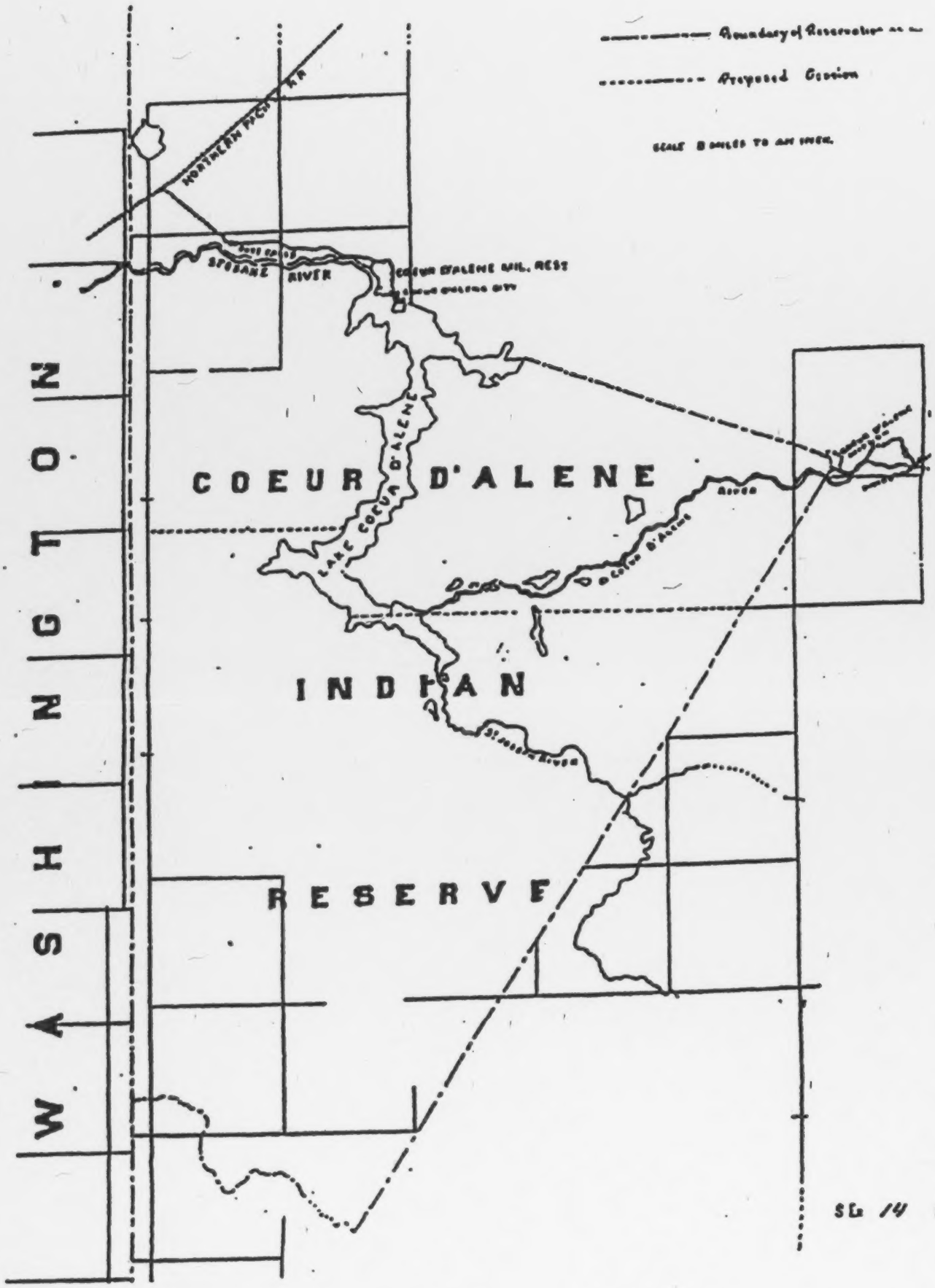
one"). Finally, as for amici's argument based on the public trust doctrine, it is sufficient to note that amici do not claim that the doctrine has ever operated in this context to provide any guidance to whether Congress intended to defeat a future state's title. In other words, amici can make their public trust doctrine argument only by their ignoring the controlling test of *Utah* and *Alaska*. *See* Amicus Br. 8-10 (Part III.D).



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No. 00-189

In the Supreme Court of the United States

STATE OF IDAHO, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The United States created the Coeur d'Alene Indian Reservation through an Executive Order that included a portion of the bed of Coeur d'Alene Lake and the St. Joe River as part of the Reservation. The district court found that, at the time of Idaho's admission to the Union, Congress clearly manifested its intent, through legislation and other actions, that the Reservation included submerged lands. The question presented is whether the court of appeals erred in affirming the district court's conclusion that Congress's actions established its intent, when Idaho was admitted to the Union, to defeat the State's title to those submerged lands.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-30) is reported at 210 F.3d 1067. The opinion of the district court (Pet. App. 31-86) is reported at 95 F. Supp. 2d 1094.

JURISDICTION

The judgment of the court of appeals was entered on May 2, 2000. The petition for a writ of certiorari was filed on July 25, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States brought this action to quiet title to submerged lands for the beneficial use of the Coeur d'Alene Indian Tribe. The disputed lands are located in

northern Idaho within the exterior boundaries of the Coeur d'Alene Indian Reservation and consist of approximately the southern third of Coeur d'Alene Lake and a portion of the St. Joe River. The United States District Court for the District of Idaho held that the United States owns those lands for the benefit of the Tribe, Pet. App. 31-86, and the court of appeals unanimously affirmed the district court's judgment, *id.* at 1-30.

1. Under the Property Clause of the United States Constitution, Congress has plenary power "to make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. Art. IV, § 3, Cl. 2. Congress's power extends to submerged lands beneath navigable waters, which have long been viewed as having special sovereign attributes. See *United States* v. *Alaska*, 521 U.S. 1, 33-34 (1997); *Utah Div. of State Lands* v. *United States*, 482 U.S. 193, 195 (1987). "As a general principle, the Federal Government holds such lands in trust for future States, to be granted to such States when they enter the Union and assume sovereignty on an 'equal footing' with the established States." *Montana* v. *United States*, 450 U.S. 544, 551 (1981). The United States may, however, deprive a future State of title to submerged lands by reserving those lands for an appropriate public purpose or by granting them to private parties. See *Alaska*, 521 U.S. at 33-34. Nevertheless, "disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." *United States* v. *Holt State Bank*, 270 U.S. 49, 55 (1926).

2. The district court made extensive findings respecting the lands at issue here. See Pet. App. 31-86.

As that court explained, the Coeur d'Alene Tribe once inhabited more than 3.5 million acres in northern Idaho and northeastern Washington, including the lands adjacent to Coeur d'Alene Lake and two associated waterways, the St. Joe River and the Spokane River. *Id.* at 32, 43. The Tribe depended on those water bodies for food, trade, travel, and cultural practices. *Id.* at 43-48. Tribal members ate trout and whitefish year-round, collected mussels and clams, traded dried fish, relied on the lake and associated rivers to facilitate hunting, gathered plants growing in the wetlands and marshes of these waterways, and used the watercourses as primary highways for travel, trade, and communication. *Id.* at 44. The lake and rivers were tied to the Tribe's "recreational pursuits, religious ceremonies and burial practices." *Id.* at 45. By the mid-1800s, through the influence of missionaries, the Tribe's members had begun to establish small garden plots, but they continued to depend on the lake and rivers for fish, waterfowl, and plants. *Id.* at 46, 49.

The arrival of non-Indian settlers in the region led to conflicts. See Pet. App. 49-50. On June 14, 1867, President Andrew Johnson issued an Executive Order establishing a reservation for the Tribe lying southwest of Coeur d'Alene Lake and including only a sliver of the lake. *Id.* at 32-33, 50. The Tribe initially was unaware of the federal government's unilateral action. When the Tribe learned that the United States had created a reservation, the Tribe expressed dissatisfaction with the boundaries and refused to accept it. *Id.* at 50. In 1871 and 1872, the Tribe sent petitions to the Commissioner of Indian Affairs describing certain areas that the Tribe considered essential for a reservation. In the 1872 petition, the Tribe made clear that it requested, in addition to 20 square miles identified in the 1871

petition, "two valleys, the S. Josephs (today called the St. Joe), from the junction of S. and N. forks, and the Coeur d'Alene from the Mission inclusively." *Id.* at 50-51. The Tribe explained that the valleys "have been from old the habitual residence of most of us" and that, although the Tribe was gaining experience at farming, "[w]e think it hard to leave at once old habits to embrace new ones: for a while yet we need have some hunting and fishing." *Id.* at 51. A government Indian agent noted, in his 1871 report, that the Tribe's members "subsist principally by hunting and fishing." *Id.* at 52. Similarly, a government official warned two years later that "there will in my opinion be trouble" if the Tribe were excluded from their traditional fisheries. *Ibid.*

In 1873, the Commissioner of Indian Affairs directed a commission to visit non-treaty Tribes in Idaho, including the Coeur d'Alene Tribe, to induce them "to abandon their roaming habits and consent to confine themselves within the limits of such reservation or reservations as may be designated for their occupancy." Pet. App. 33, 54. That year, the commission reached an agreement with the Coeur d'Alene Tribe that called for a reservation of approximately 598,000 acres and provided for compensation for the relinquishment of all claims to the remainder of the Tribe's aboriginal lands. *Id.* at 33. The reservation included, in addition to the area set aside by the 1867 Executive Order, an expanded upland area, the St. Joe and Coeur d'Alene Rivers, and all but a small portion of Coeur d'Alene Lake. *Id.* at 33-35, 55-56. The agreement also guaranteed "that the water[s] running into said reservation shall not be turned from their natural channel where they enter said reservation." *Id.* at 55. The agreement required congressional approval to become binding on

the parties. *Id.* at 33-34, 56. The Commissioner of Indian Affairs recommended that the President set apart the Reservation by Executive Order pending congressional action. *Id.* at 34, 57. On November 8, 1873, President Ulysses S. Grant established, by Executive Order, the Coeur d'Alene Indian Reservation with boundaries identical to those in the agreement. *Ibid.*

In 1883, the federal government surveyed the boundaries of the Reservation. Pet. App. 35, 57. The government instructed the surveyor to run the northern boundary across Coeur d'Alene Lake, excluding a portion of the lake's northern end from the Reservation. *Id.* at 57. Surveying a boundary across a navigable waterway "was contrary to the usual practice of meandering a survey line along the mean high water mark." *Ibid.* According to the survey, the Reservation encompassed a total area of 598,499.85 acres, "a calculation that included submerged lands under the Lake and rivers within the boundaries of the reservation." *Id.* at 57-58.

In 1885, the Tribe submitted a petition to the federal government requesting confirmation of the Reservation and payment for the lands not reserved to them. Pet. App. 68. In response, Congress authorized the Secretary of the Interior to negotiate with the Tribe "for the cession of their lands outside the limits of the present Coeur d'Alene reservation." *Id.* at 35, 68. As a result of those negotiations, the Tribe agreed in 1887 to cede its aboriginal lands "except the portion of land within the boundaries of their present reservation in the Territory of Idaho, known as the Coeur d'Alene Reservation." *Ibid.* The federal government promised, in exchange, that the Coeur d'Alene Reservation "shall be held forever as Indian land and as homes of the Coeur d'Alene Indians." *Id.* at 68-69. The 1887 agreement specified

that it was not binding on either party until ratified by Congress. *Id.* at 35, 69.

Meanwhile, the influx of non-Indians continued to encroach on tribal lands, including the associated waterways. Pet. App. 69. The government allowed steamboats to use Coeur d'Alene Lake, but the government treated the portions of the lake lying within the Reservation as Indian country and subjected the steamboats to the Trade and Intercourse Act, which prohibited introduction of liquor into Indian country. *Id.* at 69 & n.17. Non-Indians who were discovered making recreational use of the lake and rivers within the reservation boundaries were ejected as trespassers. *Id.* at 70. Consequently, pressure grew to make a portion of the lake and adjacent rivers available to non-Indian use. *Ibid.*

On January 25, 1888, the Senate passed a resolution observing that the Reservation is alleged to include "Lake Coeur d'Alene, all the navigable waters of Coeur d'Alene River, and about 20 miles of the navigable part of St. Joseph River, and part of St. Mary's, a navigable tributary of the Saint Joseph," except for about 3.5 miles of shoreline at the north end of the lake. Pet. App. 71. The resolution directed the Secretary of the Interior to "inform the Senate as to the extent of the present area and boundaries of the Coeur d'Alene Indian Reservation," including whether it included the navigable waters named in the resolution, and whether it would be advisable to release lands valuable for mineral entry as well as "any of the navigable waters aforesaid" from the limit of the reservation. *Id.* at 72.

On February 7, 1888, the Commissioner of Indian Affairs responded on behalf of the Secretary of the Interior, reporting to Congress that "the reservation appears to embrace all the navigable waters of Lake

Coeur d'Alene, except a very small fragment cut off by the north boundary of the reservation which runs 'in a direct line' from the Coeur d'Alene Mission to the head of Spokane River." Pet. App. 72. The Commissioner recommended "that changes could be made in the boundaries for the release of some or all of the navigable waters" of the Reservation without detriment to the Indians. *Id.* at 73. The Commissioner anticipated that, if the 1887 agreement with the Tribe was ratified, it would not be difficult to negotiate with the Tribe "for the cession of such portions of their reservation as they do not need, including all or a portion of the navigable waters, upon fair and very reasonable terms." *Ibid.* The Commissioner attached to the report a map of the Reservation as established by the 1873 Executive Order that showed the lake and rivers in relation to the reservation boundaries and described the reservation as including 598,499.85 acres, thus necessarily including the submerged lands. *Ibid.* Also in 1888, Congress enacted a statute provisionally granting the Idaho and Washington Railroad Company a right of way through the Coeur d'Alene Reservation that extended 75 feet into the lake and required the consent of and payment of compensation to the Tribe to make the right of way effective. Act of May 30, 1888, ch. 336, 25 Stat. 160. See Pet. App. 21 n.13.

During that same year, Congress debated whether to ratify the 1887 agreement, but postponed a final decision out of a desire "to acquire" an additional area of the Reservation. Pet. App. 74. The reservation lands of interest included, among other things, "a magnificent sheet of water, the Coeur d'Alene Lake and its chief tributary, to wit, the Coeur d'Alene River." *Ibid.* Congress accordingly initiated steps to obtain, by purchase, "the northern end of [the 1873] reservation." *Ibid.* On

March 2, 1889, Congress passed the annual Indian Appropriations Act, which included a provision authorizing the Secretary of the Interior

> to negotiate with the Coeur d'Alene tribe of Indians for the purchase and release by said tribe of such portions of its reservation not agricultural and valuable chiefly for minerals and timber as such tribe shall consent to sell.

Ibid. (quoting Act of Mar. 2, 1889, ch. 412, 25 Stat. 1002).

In negotiations conducted pursuant to this congressional authorization, the government's chief spokesperson, General Simpson, initially told tribal leader Chief Seltice that "the Lake belongs to you as well as to the whites—to all, every one who wants to travel on it." Pet. App. 75. Chief Seltice objected to "[General Simpson's] idea about the boundary." *Ibid.* General Simpson then suggested a revised boundary line that ran east from the Idaho-Washington territorial boundary to the western shore of the lake, ran south along the lake to a point about two-thirds from the northern end of the lake, and then cut directly east across the lake. *Ibid.* General Simpson explained that the government would purchase the northern end of the 1873 Reservation and leave the Tribe the "St. Joseph River and the lower part of the lake and all the meadow and agricultural land along the St. Joseph River." *Ibid.* That understanding became the basis for a final agreement that was signed on September 9, 1889. *Id.* at 75-76. The Secretary of the Interior reported to the House of Representatives that, under the 1889 agreement, the Tribe would sell lands that "embrac[ed] by far the greater portion of the navigable waters of the reservation." *Id.* at 76.

In March 1890, the House Committee on Indian Affairs reported a bill (H.R. 7703, 51st Cong., 1st Sess.) to approve the agreements with the Coeur d'Alene Tribe, see 21 Cong. Rec. 2775 (1890); H.R. Rep. No. 1109, 51st Cong., 1st Sess., and a parallel bill (S. 2828, 51st Cong., 1st Sess.) passed the Senate on June 7, 1890, see 21 Cong. Rec. 5769-5770 (1890). Shortly thereafter, on July 3, 1890, Congress admitted Idaho to the Union. Pet. App. 76; Act of July 3, 1890, ch. 656, 26 Stat. 215. The Idaho Statehood Act admitted Idaho "on an equal footing with the original States." *Ibid.* In the Statehood Act, Congress "accepted, ratified, and confirmed" the constitution of Idaho, which had been approved by Idaho voters in November 1889. *Ibid.* The constitution contained a clause that specifically renounced the State's "right and title to the unappropriated public lands" and lands "owned or held by any Indians or Indian tribes," and it recognized that "said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States." Pet. App. 76-77, 82. Later in that same Session, Congress ratified the 1887 and 1889 agreements with the Coeur d'Alene Tribe. *Id.* at 77; see Act of Mar. 3, 1891, ch. 543, 26 Stat. 989, 1027-1032.[1]

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[1] Congress later approved the removal from the Tribe's Reservation of two additional areas containing navigable waters. In 1894, Congress ratified the Harrison cession, which encompassed a one-mile strip of land that included a corner of Coeur d'Alene Lake. Pet. App. 26. In 1908, Congress withdrew a portion of the Reservation encompassing three smaller lakes and, in 1911, formally conveyed those lands by patent to the State. *Id.* at 27. Since that time, approximately 80% of the Reservation passed out of Indian ownership, and today the Tribe or tribal members own approximately 69,000 acres of the reservation. See *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 264 (1997).

3. The United States, acting in its sovereign capacity and as trustee for the Tribe, initiated this action against the State of Idaho seeking to quiet title to the submerged lands within the exterior boundaries of the Tribe's reservation for the benefit of the Tribe and its members. See *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 266 (1997).[2] In addition to its title claim, the United States sought a declaratory judgment to establish the Tribe's right to exclusive use, occupancy, and quiet enjoyment of the submerged lands. The United States also sought a permanent injunction prohibiting the State from asserting any right, title or other interest to such lands. Pet. App. 31-32. The Tribe intervened, asserting its interests based on alternative legal theories, which are not at issue in the petition for writ of certiorari. *Id.* at 32. The State of Idaho counterclaimed, requesting that title to the submerged lands be quieted in favor of Idaho. *Ibid.*

Based on the historic facts set out above, the district court concluded that the United States had "overcome the strong presumption of State ownership" and demonstrated that the United States retained the submerged lands for the benefit of the Tribe. Pet. App. 83. In summarizing its conclusions, the court explained that "the trial evidence demonstrates that the Federal Government clearly intended to include the submerged lands within the 1873 reservation." *Ibid.* The court also found that Congress was "on notice that submerged lands had been included in the 1873 reservation" and that Congress's direction to the Secretary of the

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[2] The Coeur d'Alene Tribe previously brought suit against Idaho seeking to quiet title to the whole of Coeur d'Alene Lake. See *Idaho*, 521 U.S. at 264-265. This Court concluded that the Eleventh Amendment barred the Tribe's claim. See *id.* at 281-288.

Interior to negotiate with the Tribe for the release of the submerged lands "reflected Congress's intent to ratify the inclusion of submerged lands within the reservation and to defeat the State's title to those lands." *Ibid.*

In light of those facts, the district court concluded that Congress's approval of the Idaho Statehood Act, including the disclaimer clause of the Idaho Constitution, "confirmed that the Federal Government retained title to the submerged lands for the benefit of the Tribe." Pet. App. 84. The court entered an order quieting title to the bed and banks of the Coeur d'Alene Lake and the St. Joe River lying within the current boundaries of the Coeur d'Alene Indian Reservation. *Id.* at 85-86. The district court permanently enjoined the State of Idaho from asserting any right, title or other interest in the submerged lands at issue. *Ibid.* The court did not address the Tribe's alternate legal theories. *Id.* at 84 n.27. The court also denied the State of Idaho's counterclaim. *Id.* at 86.[3]

4. Idaho appealed, and the court of appeals affirmed the district court's judgment. Pet. App. 1-30. The court of appeals explicitly applied the two-pronged test set forth by this Court in *United States* v. *Alaska*, *supra*, for determining whether the State was entitled to the submerged lands at issue. That court stated:

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[3] The district court denied Idaho's motion for stay and injunction pending appeal. See *United States* v. *Idaho*, No. CV 94- 328-N-EJL (D. Idaho Oct. 19, 1998). The court rejected the State's assertion that management of the lower part of the lake by the United States or the Tribe would adversely affect the State and the public interest. Rather, the court concluded that "the record reflects that currently the Tribe intends to honor all permits, licenses or uses issued or authorized by the State or its political subdivisions." Slip. op. 4.

"As framed by the Supreme Court, the question before us is 'whether the United States intended to include submerged lands within the [Reservation] and to defeat [Idaho's] title to those lands.'" Pet. App. 12 (quoting *Alaska*, 521 U.S. at 36). See also *id.* at 13-27.

Because Idaho conceded on appeal that the United States intended to include the submerged lands in the Reservation established by the 1873 Executive Order, the court focused on the second prong of the test. Pet. App. 13. Citing *Alaska*, the court stated that the second prong required an affirmative showing of congressional (rather than executive) intent to deprive Idaho of title to the lands in question and that such intention must be "definitely declared or otherwise made very plain." *Id.* at 12. In accordance with this Court's decision in *Alaska*, the court of appeals considered several factors that bore on Congress's understanding of the status of submerged lands within the Coeur d'Alene Reservation and on Congress's corresponding actions at the time of Idaho's admission to the Union. *Id.* at 15 & n.9.

First, the court of appeals recognized that the boundaries of the Reservation, as defined by both the 1873 Executive Order and the 1889 agreement, were drawn *across* the lake, with the 1889 agreement substantially curtailing the included acreage. Pet. App. 16. The practice of drawing the boundary across the lake, rather than along the shoreline, manifested the understanding that the submerged lands within the reservation boundary are part of the reservation. *Id.* at 16-17. The Tribe had insisted on including those submerged lands as part of the 1873 Reservation, and the government had redrawn the boundary in 1889 to "establish[] the Tribe's right to the Lake and rivers," a fact that was reflected in the maps submitted to Congress. *Id.* at

16. The court of appeals accordingly concluded that Congress was clearly on notice and must have understood that the 1873 Executive Order creating the Reservation and the 1889 agreement diminishing its size necessarily deprived a future State of title to submerged lands remaining within the Reservation. *Id.* at 17.

Second, the court of appeals observed that the United States had created the Coeur d'Alene Reservation to provide a means for tribal subsistence and that "the purpose of the reservation would have been defeated had it not included submerged lands." Pet. App. 17. The historical record showed that Congress had authorized the United States to negotiate a reservation for the Tribe, and the Tribe agreed to the 1873 Reservation, because the Tribe was dependent on the lake's fisheries. *Id.* at 18. The Tribe refused to settle on lands that did not include the lake and associated waterways. *Ibid.* Similarly, the court found that, when Congress directed the United States to renegotiate the Reservation boundaries, the United States reached agreement by ensuring that the Tribe retained beneficial ownership of the southern third of the lake and a portion of the St. Joe River. *Ibid.* In this case, as in *Alaska*, the fact that the United States had a distinct purpose for including submerged lands within the Reservation bears on the question of congressional intent, because Congress's retention of the submerged lands is necessary to fufill that purpose. See *ibid.*

Third, the court of appeals explained that Congress took a series of actions that "demonstrates acknowledgment, recognition, and acceptance of the boundaries of the 1873 reservation, which Congress knew the Executive had construed to include submerged lands, thereby showing the requisite intent to defeat state

title." Pet. App. 19-20. Congress's action in authorizing the 1889 negotiations to recover lands held by the Tribe manifested Congress's intent to honor the 1873 agreement and Executive Order. *Id.* at 21. "Although Congress had the opportunity and the power to repudiate the executive reservation and the 1887 agreement, it did not do so." Instead, Congress authorized negotiations "for the purchase *and release by said tribe* of such portions of *its reservation* . . . as such tribe *shall consent to sell.*" *Id.* at 22 (emphasis and ellipses supplied by the court) (quoting Act of Mar. 2, 1889, ch. 412, 25 Stat. 1002). The court concluded that Congress's affirmative act of directing open-ended negotiations to purchase whatever non-agricultural land, particularly submerged lands, the Tribe was willing to cede "presupposes that beneficial ownership of all land within the 1873 reservation, including submerged lands, had already passed to the Tribe." *Id.* at 23. Thus, the court concluded that Congress had "made very plain" its understanding and intent that the future State of Idaho would not have title to those reservation lands. *Ibid.* (quoting *Holt State Bank*, 270 U.S. at 555). Congress's ratification of Idaho's constitution, by which Idaho disclaimed lands "held by" Indian Tribes, provided further support for the court's conclusion. Finally, the court concluded that Congress's approval of Idaho's disclaimer, coupled with Congress's actions recognizing the Tribe's title to the submerged lands at issue here, established that Congress intended to defeat the State's title to those lands. *Id.* at 24-25.

ARGUMENT

The court of appeals correctly affirmed the district court's judgment that a portion of the bed of Coeur d'Alene Lake and the St. Joe River are part of the

Coeur d'Alene Indian Reservation. The lower courts properly identified and applied familiar legal principles that this Court recently reaffirmed in *United States* v. *Alaska*, 521 U.S. 1 (1997). This case does not involve any novel or undecided legal question, and it does not give rise to any conflict with any decision of this Court, another court of appeals, or the Idaho Supreme Court. Rather, the court of appeals' affirmance correctly resolved a fact-specific dispute over the application of settled law to a particular tract of land. The petition for a writ of certiorari accordingly should be denied.

1. As the court of appeals recognized, this Court has unequivocally established the legal principles that control this case. "In *Alaska*, the Supreme Court reaffirmed the two-prong test set forth in *Montana* and *Utah* for determining whether a state's presumptive equal footing title to submerged lands within its borders has been defeated." Pet. App. 12. The court of appeals properly examined "'whether the United States intended to include submerged lands within the [Reservation] and to defeat [Idaho's] title to those lands.'" *Ibid.* (quoting *Alaska*, 521 U.S. at 36). Idaho conceded below that "the 1873 executive order was intended to convey or reserve title to submerged lands." *Id.* at 13. Hence, the only issue before the court of appeals was whether "Congress's actions prior to statehood clearly indicate its acknowledgment, express recognition, and acceptance of the executive reservation, thereby establishing its intent to defeat the State's title." *Ibid.* The court of appeals concluded, based on a careful examination of the historical record, that Congress intended to deprive Idaho of title to a portion of the lake and river beds. *Id.* at 13-27.

Idaho argues that "the court of appeals' misapplication of the holdings in *Alaska* creates a series of con-

flicts that should be resolved through the granting of the petition for certiorari." Pet. 19. Idaho is mistaken. As a preliminary matter, Idaho is wrong in its view that this Court should review a court of appeals' supposed "misapplication" of settled law to the facts of a particular case. This Court does not grant review merely to examine the asserted "misapplication of a properly stated rule of law." Sup. Ct. R. 10. Furthermore, what Idaho describes as "conflicts" (Pet. 19) are merely Idaho's disagreements with the lower courts' factbound conclusions respecting the historical record in this case. At bottom, Idaho simply invites this Court to assume the court of appeals' role and engage in error review. There is no reason for the Court to do so. The unanimous court of appeals affirmed the district court's "lengthy and meticulous decision" (Pet. App. 2-3) on a fact-dependent issue that affects a single tract of land within a particular judicial district, and Idaho did not request rehearing or rehearing en banc on any issue in the case. Idaho's arguments in support of its petition are unpersuasive.

2. Idaho first contends (Pet. 14-16) that the decision of the court of appeals conflicts with decisions of the Idaho Supreme Court. This contention is without merit. None of the cases that Idaho cites addressed the question presented below: whether the United States, on behalf of the Tribe, retained submerged lands within the Coeur d'Alene Indian Reservation at the time it admitted Idaho to the Union—or, put another way, whether Congress intended to defeat the State's presumptive title to those lands. Indeed, none of those cases addressed any federal question at all, much less any question of ownership of the submerged lands within the Tribe's Reservation.

The cases that Idaho identifies involved the rights of private landowners near or adjacent to Coeur d'Alene Lake. Three of the four cases, by petitioner's own admission, addressed property or portions of the lake *outside* the boundaries of the Tribe's Reservation. See *Erickson* v. *State*, 970 P.2d 1 (Idaho 1998); *Kootenai Envt'l Alliance, Inc.* v. *Panhandle Yacht Club, Inc.*, 671 P.2d 1085 (Idaho 1983); *Bowman* v. *McGoldrick Lumber Co.*, 219 P. 1063 (Idaho 1923). The fourth case cited by petitioner, *West* v. *Smith*, 511 P.2d 1326 (Idaho 1973), did address the rights of an owner of property within the exterior boundaries of the Reservation. In that case, however, the Idaho Supreme Court specifically stated that the question of who held title was immaterial to its decision, see *id.* at 1330, 1331, and that it was not ruling on questions concerning rights associated with the lake bed, see *id.* at 1334.

Moreover, to the extent that those cases addressed the question of state ownership of the lake bed, they did so only in the context of determining whether individual riparian landowners had specified rights with respect to the lake by virtue of their riparian ownership or, in the case of *Kootenai Environmental Alliance*, the extent of the State's authority to grant a lease under the public trust doctrine.[4] The decisions did not

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[4] *Erickson* reviewed the trial court's determination of the lake's high water mark in order to determine whether title to certain lands could be quieted to owners of land adjacent to the lake. 970 P.2d at 2. *Kootenai Environmental Alliance* examined whether the public trust doctrine precluded the State from granting a lease to a private club for certain docking facilities. See 671 P.2d at 1087. *Bowman* examined whether the owner of property that did not extend to the high water mark of the lake had riparian rights to the lake. 219 P. at 1064. *West* addressed whether a houseboat moored to the lakebed could maintain a catwalk

consider the United States' or the Tribe's claims of title to the submerged lands themselves in the southern one-third of the lake. The state supreme court cases accordingly do not give rise to a conflict with the court of appeals' decision in this case.

3. Idaho next contends (Pet. 16-19) that the decision of the court of appeals "presents irreconcilable conflicts with decisions of this Court." The only decision of this Court that Idaho cites, however, is *Alaska*, and the court of appeals and the district court each explicitly—and correctly—applied that decision to resolve this case. See Pet. App. 11-12; *id.* at 37-38. Moreover, Idaho acknowledges that the "conflict" it posits would not "normally" provide "fertile ground for review on certiorari." Pet. 17. Idaho nevertheless urges this Court to depart from its normal practice because submerged lands disputes arise most frequently in the Ninth Circuit (*ibid.*) and because this Court's decision in *Alaska*, which arose out of the Court's original jurisdiction, was "not intended to provide national guidance or establish rules of general applicability" (Pet. 18). Idaho is wrong in both respects.

First, submerged lands disputes like the one involved here are not limited to the Ninth Circuit. Disputes over the federal government's pre-statehood reservation or conveyance of submerged lands may arise in any judicial district in which the federal government held lands in territorial status. See, *e.g.*, *Utah Div. of State Lands* v. *United States*, 482 U.S. 193 (1987) (certiorari to the Tenth Circuit in a case involving an executive designation of a reservoir site located in what is now the State of Utah); *Choctaw Nation* v. *Oklahoma*, 397

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attached to the shore, adjacent to the plaintiff's property, that interfered with the plaintiff's access to the lake. 511 P.2d at 1328.

U.S. 620 (1970) (certiorari to the Tenth Circuit in a case involving an Indian reservation created by treaty and patents and located in what is now the State of Oklahoma); *United States* v. *Holt State Bank*, 270 U.S. 49 (certiorari to the Eighth Circuit in a case involving an Indian reservation created by treaty and located in what is now the State of Minnesota).[5]

Second, there is no basis for Idaho's suggestion that cases brought under this Court's original jurisdiction—which have included landmark decisions ranging from *Marbury* v. *Madison*, 5 U.S. (1 Cranch.) 137 (1803), to *United States* v. *California*, 332 U.S. 19 (1947)—fail "to provide national guidance or establish rules of general applicability." Pet. 18. The Court's decisions in original actions have equal dignity with decisions rendered on certiorari or appeal. Indeed, the Court's decision in *Alaska* reaffirmed generally applicable legal principles that had previously been set out in *Utah*, *Montana*, and *Holt State Bank*, and that control this case. As we have noted, Idaho simply objects to what it views as "the court of appeals' misapplication" of those principles. Pet. 19. Idaho's objections are not only fact-based challenges respecting settled principles, but they are also mistaken on the merits.

a. Idaho contends that the court of appeals misapplied *Alaska* because that court did not require a showing that Congress "affirmatively intend[ed] to defeat state title." Pet. 19-22. Idaho is wrong. The court of appeals applied *Alaska*'s explicit test, which

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[5] Idaho also argues that disputes over submerged lands in "executive order" reservations occur most frequently in the Ninth Circuit. Pet. 17-18. But the Court's decisions in *Alaska*, *Utah*, and *Montana* do not suggest that a different legal standard would apply to those reservations. Hence, there is no reason to create a special certiorari rule for Executive Order reservations.

inquires "whether the United States intended to include submerged lands within the [reservation] and to defeat [the State's] title to those lands." Compare *Alaska*, 521 U.S. at 36, with Pet. App. 12 (the congressional action must manifest "an affirmative intent to defeat state title"). As the court of appeals correctly explained, "the test is whether Congress clearly intended to defeat the State's title to submerged lands." *Id.* at 21. The facts in this case, as found by the district court, satisfy that standard. See *id.* at 21-25. As the court of appeals explained, "Congress was heavily involved in deciding the fate of the submerged lands set aside for the Tribe's benefit by executive order. Congress treated the submerged lands as beneficially owned by the Tribe—to the point of authorizing negotiations for cession of whatever portion of the Tribe's submerged lands it was willing to sell." *Id.* at 24-25. Congress, through its various legislative actions, including its approval at statehood of Idaho's constitutional disclaimer of Indian lands, made its intentions "very plain." *Alaska*, 521 U.S. at 34 (quoting *Holt State Bank*, 270 U.S. at 55).[6]

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[6] Idaho suggests that Congress directed negotiations in 1889 aimed at purchasing submerged lands that the Tribe held under the 1873 Executive Order because it wanted "to secure the immediate release of at least some of the Lake from its status as 'Indian country'" before turning the whole lake over to the State in 1890. Pet. 21. That theory makes no sense. If Congress believed that the Tribe had no right to the lake bed, it would not have authorized negotiations aimed at *acquiring* whatever portion of those lands as the Tribe "shall consent to sell." Act of Mar. 2, 1889, ch. 412, 25 Stat. 1002. Indeed, Idaho's theory suggests that Congress was engaged in blatant trickery. Under Idaho's view, Congress purported to authorize negotiations for the purchase of those submerged lands that the Tribe would sell, but Congress intended to transfer to the State, without payment to the Tribe, whatever

b. Idaho next contends (Pet. 22-26) that the court of appeals misapplied this Court's teachings with respect to the relevance of the purpose of a reservation in determining congressional intent. Idaho is plainly mistaken. This Court's decisions recognize that "the *purpose* of a conveyance or reservation is a critical factor in determining federal intent." *Alaska*, 521 U.S. at 39. The Court specifically cited, as an example, its ruling in *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 87-89 (1918), that a "reservation of [a] 'body of lands' in southeastern Alaska for Metlakahtla Indians included adjacent waters and submerged lands, because fishing was necessary for Indians' subsistence." *Alaska*, 521 U.S. at 39. The court of appeals directly applied the *Alaska* decision to the facts presented by the Coeur d'Alene Reservation. See Pet. App. 14-15 (discussing the relevance of a reservation's purpose). The court of appeals noted that, "[a]s the district court found, and as the State does not challenge, the Tribe was dependent on its fisheries in 1873." *Id.* at 17. Furthermore, the Tribe's continued insistence on beneficial ownership of a portion of the lake and river in 1889 manifests the Tribe's continued reliance on those water resources and submerged lands at the time of Idaho's admission to the Union in 1890. See *id.* at 18, 73, 75. If Congress had believed that the Tribe no longer needed those resources at the time of Idaho's admission, Congress would have sought to acquire the

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lands the Tribe decided to retain. There is no basis for inferring that Congress had that intention. Rather, the historical record shows that Congress understood the 1873 Executive Order to have reserved most of the lake bed for the benefit of the Tribe and that the future State of Idaho would be entitled to only those portions that Congress reacquired through negotiations with the Tribe. See Pet. App. 21-23.

entire lake and river bed, rather than only "such portions of [the Tribe's] reservation not agricultural and valuable chiefly for minerals and timber *as such tribe shall consent to sell*." Act of Mar. 2, 1889, ch. 412, 25 Stat. 1002 (emphasis added). Cf. Pet. 25-26 (quoting the Act of March 2, 1889, but omitting the emphasized phrase).

c. Finally, Idaho contends that "[t]he court of appeals' decision ignores the fact that Congress purposefully deferred its ratification of the Reservation until after statehood." Pet. 26-29. Idaho's factbound challenge is both wrong and inconsequential. The court of appeals did address that issue. The court recognized that, following Idaho's admission—and Congress's ratification of Idaho's disclaimer of all lands "owned or held by any Indians or Indian tribes," Idaho Const. Art. XXI, § 19—Congress ratified both the 1887 and 1889 agreements. Pet. App. 8. The court of appeals properly accepted the obvious import of Congress's actions: Congress intended to admit Idaho to the Union while at the same time honoring the United States' agreements with the Coeur d'Alene Tribe. *Id.* at 23. Congress could do so only by retaining title to the submerged lands at issue here for the benefit of the Tribe. *Id.* at 81. If Congress had intended to deprive the Tribe of ownership of the residual portion of the lake bed—and deny the Tribe the benefit of the bargain the parties had made—Congress would have *refused* to honor those agreements or would have modified them to exclude the lake and river bed. Instead, Congress ratified the 1887 and 1889 agreements without any modification of the final reservation boundaries set out in the later agreement, and thereby confirmed what its pre-statehood actions made clear: The United States

retained a portion of the bed of Coeur d'Alene Lake and the St. Joe River for the benefit of the Tribe.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[7] Indeed, as explained above (see p. 9, *supra*), by the time Congress passed the Idaho Statehood Act admitting Idaho to the Union in July 1890, the Senate had already passed a bill to ratify the 1887 and 1889 agreements with the Coeur d'Alene Tribe, and the House Committee on Indian Affairs had already reported a parallel bill to the House of Representatives. In doing so, there was no suggestion that passage of the Statehood Act would be in derogation of the agreements' retentions of the lake and river bed for the benefit of the Tribe. Congress thus obviously viewed its approval of the Statehood Act and of the agreements with the Tribe as consistent and complementary. The court of appeals therefore properly gave effect to the text of the 1889 agreement that preserved the southern portion of the lake and the relevant portion of the St. Joe River for the Tribe.

(5)

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In The

Supreme Court of the United States

STATE OF IDAHO,

Petitioner,

v.

UNITED STATES OF AMERICA
and COEUR D'ALENE TRIBE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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BRIEF IN REPLY

The State of Idaho replies to the arguments raised in the Briefs of the United States and the Coeur d'Alene Tribe in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

ARGUMENT IN REPLY

1. The United States and the Coeur d'Alene Tribe allege that the court of appeals simply resolved a fact-specific dispute that does not warrant this Court's review. Of course the dispute was fact-specific: all disputes are. The State's petition, however, does not raise factual issues; rather, it questions the court of appeals' reformulation of the legal standards used to infer congressional intent to deny a state's sovereign rights to submerged lands. By holding that state title to submerged lands within an executive order Indian reservation is defeated whenever Congress "recognizes" such a reservation, the court has dramatically eased the standards required for finding such a defeat, thus departing from the traditional "strong presumption against conveyance [of submerged lands] by the United States" to Indian tribes. *Montana v. United States*, 450 U.S. 544, 552 (1981).

The Tribe and the United States argue that the court of appeals' relaxation of the legal standards protecting state ownership of submerged lands was justified by this Court's decision in *United States v. Alaska*, 521 U.S. 1 (1997), which held that Congress may express an intent to defeat state title to submerged lands by recognizing, in a statehood act, pre-existing reservations of submerged lands originally reserved by executive order.

The *Alaska* decision, however, did not modify the standards that this Court has established for resolving whether Congress has conveyed permanent title of submerged lands to Indian tribes. Indian reservations have a

unique status in the law. Unlike other federal reservations, where the federal government holds unrestricted fee title, federal title to lands within Indian reservations must be viewed in conjunction with the property rights of the occupant tribe. To get a complete picture of the title within an executive order Indian reservation, one must examine both the rights held by the United States, and the rights granted to the tribe as a result of the executive order.

Thus, unlike the situation in *Alaska*, where the Court addressed rights reserved by the United States to itself, the primary task with regard to issues of title within an Indian reservation is to determine what rights have been vested in the Tribe as a result of executive and congressional actions. It is well-established that an executive order does not convey permanent title to the occupant tribe. *See Hynes v. Grimes Packing Co.*, 337 U.S. 86, 103 (1949) ("[a]n Indian reservation created by Executive Order of the President conveys no right of use or occupancy to the beneficiaries beyond the pleasure of Congress or the President"). This was certainly the understanding of Congress at the time it enacted the 1889 Act that authorized negotiations for the cession of a portion of the Coeur d'Alene Reservation. Act of March 2, 1889, 25 Stat. 980, 1002. Senate reports studying this issue concluded that, within executive order reservations, " 'the Indians were given a license to occupy the lands described in [the executive order] so long as it was the pleasure of the Government that they should do so, and no right, title, or claim to such lands had vested in the Indians by virtue of this occupancy.' " *Sioux Tribe of Indians v. United States*, 316 U.S. 317, 328 (1942), *quoting* S. Rep. No. 664, 52d Cong., 1st Sess. 2 (1892).

In short, tribes possess only temporary rights of possession to lands reserved by executive order; congressional action is required to vest tribes with permanent

rights in such lands. This Court has held that "the Constitution places the authority to dispose of public lands exclusively in Congress. . . . " *Sioux Tribe*, 316 U.S. at 326; *see also Karuk Tribe v. Ammon*, 209 F.3d 1366, 1373 (Fed. Cir. 2000) ("only an Act of Congress can grant a right of permanent occupancy as opposed to permissive occupancy").-Thus, within an executive order Indian reservation, permanent property interests are conveyed to the occupant tribe only where Congress has delegated such authority to the President, *Sioux Tribe*, 316 U.S. at 326, or where Congress ratifies the executive order with a "purpose to transform the Executive Order into a conveyance of something more than a mere temporary and cancellable possessory right to the Indians." *Confederated Bands of Ute Indians v. United States*, 330 U.S. 169, 178 (1947). Moreover, "[a]n Act granting permanent, rather than permissive, occupancy, must expressly create those rights." *Karuk Tribe*, 209 F.3d at 1374.

The Tribe and the United States, as well as the court of appeals, simply ignore the body of law defining the rights that may pass to a tribe as the result of an executive order. Indeed, the court of appeals made the unwarranted assumption that Congress did not need to expressly confer title upon the Tribe, because, in its view, beneficial ownership of submerged lands had already passed to the Tribe as a result of the 1873 Executive Order. Pet. App. 15-16. This fundamental departure from this Court's precedents permeates the opinion. For example, the court of appeals stated that Congress' authorization of "negotiations in 1889 to purchase and thereby recover whatever portion of those lands the Tribe was willing to sell demonstrates its acknowledgment that beneficial ownership of the lands had passed to the Tribe." Pet. App. 21. The court later concluded that:

> The affirmative course of action on which Congress embarked in 1889 – open-ended negotiations to purchase whatever non-agricultural

> land, particularly submerged lands, the Tribe was willing to cede – presupposes that beneficial ownership of all land within the 1873 reservation, including submerged lands, had already passed to the Tribe."

Pet. App. 23.

In short, the core of the court of appeals' holding ignores the settled law of this Court, which holds that executive orders cannot convey beneficial ownership of reservation lands to Indian tribes. By ignoring this core principle, the court of appeals improperly focused its efforts on determining whether Congress "recognized" the reservation, instead of asking, as it must under *Confederated Bands of Ute Indians* and other cases, whether Congress affirmatively intended to transform the Tribe's temporary right of permissive occupancy into permanent title.

No fair reading of the 1889 Act can lead to the conclusion that Congress acted with affirmative intent to transform the temporary rights of possession the Tribe held pursuant to the executive order into permanent rights of title. By its terms, the 1889 Act did not convey any title or other rights to the Tribe. Nor is there any evidence that Congress, by authorizing negotiations, intended to authorize the executive branch to convey any title to the Lake, since such authorization would have to be explicit. *See Hynes*, 337 U.S. at 104 ("When Congress intends to delegate power to turn over lands to the Indians permanently, one would expect to and doubtless would find definite indications of such a purpose"). Indeed, the language of the 1889 Act, when viewed in conjunction with the 1886 Act, makes it clear that Congress was reserving to itself the right to decide whether or not the Tribe's rights to the reservation would be made permanent. *See* Act of May 15, 1886, 24 Stat. 29, 44 ("no agreement made shall take effect until ratified by Congress"); Act of March 2, 1889, 25 Stat. 980, 1002 ("which

purchase shall not be complete until ratified by Congress").

Congress, by reserving to itself the right to ratify any agreement resulting from the negotiations, was acting in accordance with its established policy. As the Tribe notes, following the 1871 statute that forbade further treaties with Indian tribes, ratification by both houses of Congress was "simply the normal practice of the day replacing the requirement of Senate treaty ratification." Brief in Opposition of Respondent Coeur d'Alene Tribe at 13. This course of conduct established a general policy requiring explicit congressional approval before any permanent title, beneficial or otherwise, passed to the Tribe. The United States and the Tribe have offered no explanation as to why Congress would have departed from this policy with regard to the Coeur d'Alene Reservation. Absent such an explanation, the court of appeals' decision holding that Congress conferred permanent title upon the Tribe by simply authorizing negotiations is in clear conflict with the decisions of this Court.

2. Even if one ignores the fundamental difference between Indian reservations and other federal reservations, there is still no basis for the assertions that the court of appeals correctly extended the decision in *Alaska* to the congressional acts at issue here. *Alaska* stands only for the proposition that congressional recognition of executive order reservations may defeat state title to submerged lands, when such recognition is embodied in a statehood act that specifically addresses the allocation of such lands between the state and federal governments, and then only when it is clear that defeat of state title is necessary to fulfill the purposes or objectives of the reservation.[1]

---

[1] In *Alaska*, the Court, in examining its previous submerged lands decisions, concluded that "in each case, we focused on the

The court of appeals, however, extended the holding in *Alaska* to a pre-statehood congressional action that did not specifically address the allocation of sovereignty and title between state and federal governments. In doing so, it departed completely from this Court's decisions addressing the level of specificity necessary to find a defeat of state title in a pre-statehood congressional action. In addressing alleged conveyances of submerged lands to Indian tribes, this court has always emphasized that such a conveyance must be " 'definitely declared or otherwise made plain,' " or "rendered 'in clear and especial words.' " *Montana*, 450 U.S. at 552, *quoting United States v. Holt State Bank*, 270 U.S. 49, 55 (1926), and *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 411 (1842). Pre-statehood reservations are held to defeat state title only where the United States can "establish that Congress affirmatively intended to defeat the future State's title to such land." *Utah Div. of State Lands v. United States*, 482 U.S. 193, 202 (1987). In other words, before pre-statehood actions are held to defeat state title to submerged lands, it must be demonstrated that Congress specifically contemplated the effect of its actions on future state title.

By applying the "recognition test" used in *Alaska* to pre-statehood actions, the court of appeals bypassed this important threshold test requiring concrete evidence that Congress contemplated the effect of its actions on future state title. The "recognition test" could be employed in *Alaska* only because one of the purposes of the Alaska

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purpose of the conveyance or reservation as a critical factor in determining federal intent." 521 U.S. at 52. In concluding that the United States retained title to submerged lands within the reservations reviewed in *Alaska*, the Court concluded that "defeating state title to submerged lands was necessary to achieve the United States' objective," *id.* at 42, or that "retention of lands underlying those waters was critical to the Government's goal. . . . " *Id.* at 52.

statehood act was to examine the lands held in federal ownership and make determinations as to which lands would pass to the State and which would be retained in permanent federal ownership. *Alaska*, 521 U.S. at 55. Thus, it was clear from the context of the act that Congress contemplated the effect of its action on state ownership of submerged lands within the reservations being addressed. *Id.* at 57 ("Congress clearly contemplated continued federal ownership of certain submerged lands").

Here, however, the context of the act does not suggest that Congress contemplated the effect of its actions on future state title. By applying the *Alaska* "recognition test" to a pre-statehood action, the court of appeals created a conflict requiring review by this Court.

3. In *Alaska*, the Court held that the purpose of a reservation is a "critical factor" in determining whether Congress intended to defeat state title. 521 U.S. at 52. A defeat of state title to submerged lands should be inferred only where such defeat is necessary to fulfill the purposes for which the land was reserved. *Id.* at 42-43. The court of appeals rejected purpose as a critical factor, stating that it is not "require[d] that Congress apprehend the purpose of the reservation at the time it takes action recognizing the executive reservation." Pet. App. 18 n.11. It also stated that Congress' understanding in 1889 regarding the Tribe's conversion to an agricultural lifestyle was "irrelevant," since the Tribe had been dependent upon fishing when the reservation was originally created in 1873. Pet. App. 19.

The United States and the Tribe attempt to explain away the court of appeals' rejection of purpose as a critical factor by suggesting that "inclusion of the submerged lands in the Reservation was necessary to accomplishing the United States' purposes here because it was part of the consideration demanded by the Tribe in exchange for acceding to the United States' other goals."

Brief in Opposition of Respondent Coeur d'Alene Tribe at 3 n.1; Brief for the United States in Opposition at 21.

This argument subverts the principle that submerged lands are held in a solemn trust for the benefit of future states. *Montana*, 450 U.S. at 551. The United States is not free to use submerged lands as bargaining chips for the accomplishment of other objectives. It may defeat state title to submerged lands only when continued federal ownership of the submerged lands is necessary to accomplish a purpose which requires continued federal ownership of the submerged lands.[2] The court of appeals, by failing to make this critical determination, departed from this Court's submerged lands decisions, in essence creating a new rule in which there is no need to determine whether congressional purposes require the defeat of state title. This clear-cut conflict with this Court's decisions requires review.[3]

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[2] *See Alaska*, 521 U.S. at 42 (finding that federal ownership of submerged lands was necessary to purpose of preserving petroleum reserves); *id.* at 55 (finding that federal ownership of submerged lands was necessary to purpose of preserving wildlife habitat); *id.* at 52 (noting that prior decisions had rejected tribal claims of ownership of submerged lands where tribe was not dependent upon fishing for its subsistence).

[3] The Tribe's argument that Congress intended to retain the submerged lands because such retention was necessary to meet tribal demands also fails as a factual matter, since Congress, in authorizing negotiations, could not have known that the Tribe would demand retention of a portion of the Lake as consideration for its cession of other portions of the Reservation. Congress authorized the negotiations on March 2, 1889; the negotiations took place in August and September of that same year. Act of March 2, 1889, 25 Stat. 980, 1002; Pet. App. 74. Thus, if any demands took place (a fact far from clear from the negotiation transcripts), they took place five months after the congressional action alleged to defeat state title.

4. Both the United States and the Tribe assert that a further reason for denying the petition for certiorari is the presence of language in the Idaho Constitution disclaiming title to lands "owned or held" by Indian tribes. Idaho Const., Art. XXI, § 19. Such an argument raises issues not presented in the petition for certiorari, since the court of appeals did not reach the issue of whether Congress' approval of the disclaimer language[4] would divest the State of title to the disputed submerged lands. Further, any reliance on the disclaimer clause of the Idaho Constitution simply begs the question: certainly, the clause recognizes and respects tribal title to Indian lands, but unless Congress took affirmative steps to convey the submerged lands to the Tribe prior to statehood, the submerged lands were not "Indian lands," but were held in trust for the future state.

5. It is fitting that this Court resolve disputes between a state and the United States regarding fundamental aspects of state sovereignty. *United States v. Texas*, 143 U.S. 621, 643 (1892). This Court has traditionally granted certiorari in cases involving competing federal and state claims to submerged lands, even in the apparent absence of conflicting decisions by lower courts. *See, e.g., Utah Division of State Lands*, 482 U.S. at 200; *Montana*

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[4] Unlike other western states, Idaho's state constitution was not the result of an enabling act, which typically contained provisions requiring a disclaimer to federal and Indian lands as a condition of statehood. *See, e.g.*, Enabling Act of Feb. 22, 1889, § 4, 25 Stat. 677 (North Dakota, South Dakota, Montana and Washington). Rather, the disclaimer language in the Idaho Constitution originated with the drafters of the state constitution, not with Congress. Neither the United States nor the Tribe have offered any evidence indicating that the drafters of the Idaho Constitution understood themselves to be disclaiming title to submerged lands to which the State would otherwise have been entitled absent such a disclaimer.

v. United States, 450 U.S. at 547. The same is true of competing tribal and state claims. *See, e.g., Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970). The United States and the Tribe have given no reasons requiring a departure from this tradition.

6. The Tribe raises a number of fact-specific issues that were not addressed by the court of appeals, including the unfounded allegation that submerged lands have no special place in Idaho history, Brief in Opposition of Respondent Coeur d'Alene Tribe at 18, and the inferences that the Tribe asserts should be made from a patent granted to Frederick Post (that contained submerged lands both inside and *outside* the reservation boundary), *id.* at 10. Although the State disagrees with these factual allegations, they are not discussed herein, since they were not considered by the court of appeals and have no bearing on the issue of whether the petition for certiorari should be granted.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

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Petitioner,

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COUER D'ALENE TRIBE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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I. INTEREST OF AMICI

This Amicus Brief is submitted pursuant to Rule 37. Amici are Benewah County and Kootenai County in the State of Idaho. The navigable waters at issue are located within the Amici Counties. The navigable waters are claimed by the United States and the Coeur d'Alene Tribe. The residents of the Amici have used and enjoyed the navigable waters for more than 100 years. The Amici and the public located in Amici Counties are being affected by the decision of the Court of Appeals, and will be affected by the decision of this Court.

The decision of the Ninth Circuit Court of Appeals in *United States v. Idaho*, 210 F.3d 1067 (9th Cir. 2000) not only ousts the State of Idaho from exercising jurisdiction and authority over the navigable waters within the Coeur d'Alene Indian Reservation, but ousts the Amici Counties from exercising any jurisdiction or authority over activities on such navigable waters. In addition, the Tribe claims that it has the absolute and exclusive authority over the navigable waters, including the power and authority to exclude or prohibit any use of such waters by non-members. The purpose of this Amicus Curiae Brief is to emphasize the far reaching implications of the decision of the Ninth Circuit Court of Appeals and to provide further support for granting the Petition of Idaho.

II. SUMMARY OF THE ARGUMENT

This is a case by the United States bringing an action to quiet title to a portion of the beds and banks of the navigable waters of Coeur d'Alene Lake and the St. Joe River lying within the exterior boundaries of the 1873

Coeur d'Alene Indian Reservation. The Coeur d'Alene Tribe is an intervenor. *United States v. Idaho*, 210 F.3d 1067 (9th Cir. 2000) Petition App. 1, et seq. Generally, the beds and banks of navigable waters are part of the sovereign rights acquired by a state through the operation of the Constitution of the United States when a state is admitted on an equal footing with the original states. *Utah Division of State Lands v. United States*, 482 U.S. 193, 195-197 (1987); *Montana v. United States*, 450 U.S. 544, 551 (1981); and *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 373-74 (1977). Thus, in this case, the Court will be addressing issues that will determine the rights of sovereignty as between the United States, the State of Idaho and the Coeur d'Alene Tribe.

In a contest between the United States and a state involving sovereign rights over land, it is appropriate that such a decision should be rendered by the highest Court of this Nation. *United States v. Texas*, 143 U.S. 621, 643 (1892). As stated in *United States v. Texas*, a decision by this Court under these circumstances best comports "with the dignity of a State, that a case in which it was a party should be determined in the highest, rather than in a subordinate, judicial tribunal of the nation." Regardless of the outcome, this Court should decide this matter.

The Executive Order in 1873, the Agreements between the Tribe and the United States negotiated in 1887 and 1889, the admission of the State of Idaho by Congress on an equal footing in 1890, and the ratification of the 1887 and 1889 agreements by Congress in 1891 should be considered in the context of the congressional and government policy at the time. The government policy and other actions taken by Congress from 1871 to 1891

shows that Congress intended to diminish tribal control and sovereignty. The general policy was for the "assimilation" of individual members.

At the time of the negotiation of agreements with the Coeur d'Alene Tribe, the State of Idaho was admitted on an equal footing with the original states. (Idaho Admission Bill, Act of July 3, 1890, 26 Stat. 215.) The rule of law established by this Court prior to admission of Idaho was that new states have the same rights as the original states in lands below the high water mark on navigable waters. *Lessee of Pollard v. Hagan*, 44 U.S. (3 How.) 212, 230 (1844); and *Shively v. Bowlby*, 152 U.S. 1, 26 (1894). The enactments of Congress and the decisions of this Court which are contemporaneous with the negotiation of agreements with the Coeur d'Alene Tribe support the conclusion that Congress did not intend to recognize tribal ownership of the beds of the navigable waters of Lake Coeur d'Alene and the St. Joe River prior to Idaho statehood in 1890. The conclusion of the Ninth Circuit Court of Appeals upholding tribal ownership of navigable waters is inconsistent with the actions of Congress and the decisions of this Court between 1887-1891.

The concept of the public trust doctrine was first explained in *Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 367, 414 (1842). The Public Trust Doctrine was further described in *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 435, 452 (1892) and establishes the rights of the public in navigable waters. There is no body of law which assures the use of navigable waters by the public, including non-members of the Tribe, if such waters are owned by the United States for the Coeur d'Alene Tribe.

The Coeur d'Alene Tribe has claimed that it may exclude or prohibit any use by non-members of the navigable waters owned by the Tribe. Amicus App. pp. 2 and 5. It is clear that the State of Idaho could not exclude or prohibit the use of such navigable waters by the public. *Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1093-94 (Idaho 1983). Thus, this case is a matter of extraordinary public interest for all of the people of Benewah and Kootenai Counties.

III. ARGUMENT FOR GRANTING PETITION

A. This Court Should Recognize the Dignity of the State of Idaho and Decide the Ownership Issue of Navigable Waters

This Court has recognized that "the ownership of land under navigable waters is an incident of sovereignty." *Montana v. United States*, 450 U.S. 544, 551 (1981). Control over property underlying navigable waters is strongly identified with the sovereign power of government. *Id.*, 450 U.S. at 552; and *United States v. Oregon*, 295 U.S. 1, 14 (1935). At issue in this case is whether the State of Idaho or the United States and the Coeur d'Alene Tribe have the rights and powers over the lands and water at issue herein. This Court has previously recognized Idaho's ownership of the beds of navigable waters under the equal footing doctrine. *Scott v. Lattig*, 227 U.S. 229, 243 (1913).

This is truly a case of a contest between sovereigns over lands that are closely identified with sovereign power. The issues in this case should be decided by this Court "because it best comport[s] with the dignity of a

State, that a case in which it was a party should be determined in the highest, rather than in a subordinate, judicial tribunal of the Nation." *United States v. Texas*, 143 U.S. 621, 643 (1892). It is interesting to note that in the litigation in *United States v. Oregon*, wherein the United States and Oregon were claiming title to a bed of navigable water, the action was brought as an original suit by the United States against the State of Oregon in this Court. *United States v. Oregon*, 295 U.S. at 5. Cases involving such critical rights of sovereignty should be decided by this Court as the highest Court in the land.

B. The Established Government Policy and Law in 1890 Does Not Support United States and Tribal Ownership of Lake Coeur d'Alene

Since the earliest days of our federal government, the policy has been to preserve navigable waters for the use by the public. *See* 1 Stat. 468 (1796); and 2 Stat. 235 (1803). This policy and law remains today. 43 U.S.C § 931.

In the late 1800's, the general policy of Congress was to reduce the role of tribal governments and increase the independence and assimilation of individual tribal members. In 1871, Congress expressly prohibited the acknowledgment or recognition of any tribe as an independent nation, tribe or power with whom the United States may contract by treaty. 16 Stat. 566 (1871) (codified at 25 U.S.C. § 71.) In 1887, Congress enacted the General Allotment Act of February 8, 1887 (24 Stat. 388, et seq.) [25 U.S.C §§ 331, et seq.]. The policy of the General Allotment Act was "to end the tribal and nomadic life of the Indians by allotting a portion of reservation lands in severalty to

each Indian residing on a reservation, and selling off the excess lands. The Indians were to be established as individual settlers on separate allotments of land gaining a livelihood by pastoral pursuits." *Hopkins v. United States*, 414 F.2d 464, 467 (9th Cir. 1969). In *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 650, note 1 (1976), this Court noted the object of the General Allotment Act of 1887 was to end tribal land ownership and to provide for private ownership by individual Indians with the expectation of assimilation of individual Indians as members of society and to relieve the Federal Government of the need to supervise Indian affairs.[1]

In 1887 and 1889, the United States negotiated agreements with the Coeur d'Alene Tribe. Pet. App. 68, 74-76. The context of other Congressional enactments during the time-frame of the negotiation of the agreements in 1887 and 1889 together with the admission of the State of Idaho on an equal footing with the original states in 1890, and the 1891 Congressional ratification of the 1887 and

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[1] For a discussion of the General Allotment (Dawes) Act of 1887, see *Cohen's Handbook of Federal Indian Law*, 1982 Ed., pp. 130-132. For further discussions of Federal policies regarding the status of tribes and individual members in the late 1800s, see *United States Department of the Interior, Federal Indian Law*, U.S. Government Printing Office (1958), pp. 245-250 (hereafter referred to as "1958 Federal Indian Law"). It was reported that the " ' . . . settled policy of the Government [was] to break up reservations, destroy tribal relations, settle Indians upon their own homesteads, incorporate them into the national life and deal with them not as nations or tribes or bands, but as individual citizens.' " 1958 Federal Indian Law at 249 quoting Report, Commissioner of Indian Affairs, 1890, p. VI.

1889 agreements does not support ownership of Coeur d'Alene Lake by the United States or the Coeur d'Alene Tribe. The fact that Congress did not ratify the 1887 and 1889 Agreements until after the admission of Idaho on an equal footing implies that Congress did not intend to defeat Idaho's title to the beds of navigable waters.

C. There Was No International Duty or Public Exigency Sufficient to Defeat Idaho's Title to the Navigable Waters

In many previous cases, this Court has concluded that a conveyance of land under navigable waters would only be upheld because of some international duty or public exigency. *E.g., Montana v. United States,* 450 U.S. 544, 552 (1981); *United States v. Holt State Bank,* 270 U.S. 49, 55 (1926); and *Shively v. Bowlby,* 152 U.S. 1, 58 (1894). There is a strong presumption against a conveyance of the beds of navigable waters to defeat State title. *Montana v. United States,* 450 U.S. at 552. Conveyance of the bedlands are not lightly to be inferred. *Id.*

Here, no "international duty" is shown by the findings of the District Court which would support a defeat of State title. The only "public exigency" found by the District Court relates to subsistence. Pet. App. 60-61. This is controverted by the State of Idaho in its Petition at pp. 7-8. The "public exigency" identified by the District Court has never been recognized by this Supreme Court as a basis for defeating the title of a State. Furthermore, there is no showing of a public purpose appropriate to the objects for which the United States holds title to the territory prior to Idaho statehood. Such public purpose

and intent was established in *United States v. Alaska*, 521 U.S. 1 (1997). Here, there has been no showing of such public purpose. In fact, the general policy of the federal government in the 1880s and 1890s shows that Congress did not intend to extend or promote tribal authority over lands. Thus, the basic requirements for the defeat of State title do not appear in this case.

D. Rights of the Public Under the Public Trust Doctrine are Inconsistent with Tribal Ownership

As shown by the Coeur d'Alene Tribal Code Section 44-1.02, Amicus App. 3 attached hereto, the Coeur d'Alene Tribe claims that it has the exclusive power and authority over the navigable waters within the Coeur d'Alene Indian Reservation. The Tribe further claims that it has the power to exclude or prohibit non-Tribal members from using the submerged lands under the navigable waters. Tribal Code Section 44-2.00. Amicus App. 3-4 Tribal members are defined in Coeur d'Alene Tribal Code Section 44-3.32. Amicus App. 7 This is inconsistent with the public trust doctrine as previously announced by this Court. *See Illinois Central Railroad Company v. Illinois*, 146 U.S. 387 (1892). A state holds the beds of navigable waters in trust for the enjoyment of the public, which includes navigation of the waters and the liberty of fishing on such waters. *Id.*, 146 U.S. at 452.

The public trust doctrine was actually originally described in *Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 367, 413-14 (1842). In *Martin*, this Court considered the question settled in England that the Magna Carta limited the authority of the King to make a grant of the soils

under navigable waters to exclude the public from enjoying such waters, including the right of fishing, navigation, etc. 16 Pet. at 410. The interest of the King of England devolved upon the original states by virtue of the Revolution. 16 Pet. at 416. New states have been admitted on an equal footing with the original states with the same limitations. *Illinois Central Railroad*, 146 U.S. at 435-437. The State of Idaho holds the lands lying under navigable water subject to the Public Trust Doctrine with its limitations. *Kootenai Environmental Alliance v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1088, 1093-94 (Idaho 1983). The rights of the public to use the lands underlying navigable waters are well established in the United States and the State of Idaho.

The rights of the public, including the residents of these Amici Counties, on navigable waters owned by the United States for the benefit of the Tribe or owned by the Tribe are not established under any law. Tribes are generally not constrained by the Constitutional provisions which govern the federal or state governments. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978); and *Talton v. Mayes*, 163 U.S. 376, 384 (1896). If the Coeur d'Alene Tribal Government legislates to exclude non-members on the navigable Tribal Waters, such Tribal Government is immune from suit unless the Tribe has unequivocally expressed a waiver of its sovereign immunity. *Santa Clara Pueblo*, 436 U.S. at 58-59. Thus, any suit to protect use of the navigable waters by non-tribal persons would be met by the absence of a law protecting the public's rights under the Public Trust Doctrine and barred by the sovereign immunity of the tribe.

The independence of a tribe from the will and law of non-members is also illustrated in *In Re: Kang-Gi-Shun-Ca, otherwise known as Crow Dog*, 109 U.S. 556, 572 (1883) and *Santa Clara Pueblo*, 436 U.S. at 69-71. As shown in *Santa Clara Pueblo*, a tribe establishes, for itself, its own membership rules. 436 U.S. at 52, Note 2. A person who is not a member of the tribe may not vote in tribal elections or hold office in the Tribal Government. 436 U.S. at 52. The non-member may be excluded from the reservation. 436 U.S. at 52-53. As previously noted, a non-member can be excluded from the use of the navigable waters within the Coeur d'Alene Indian Reservation by tribal law. When Congress admitted Idaho on an equal footing in 1890 and delayed ratifying the 1887 and 1889 Agreements until 1891, it is difficult to conclude that Congress intended to defeat the interests of non-Tribal members and defeat the title of the State of Idaho.

IV. CONCLUSION

This Court should grant the Petition requested by the State of Idaho in this matter. The defeat of Idaho's title to the lands underlying Coeur d'Alene Lake and the St. Joe River should not be implied from the facts of this case.

Respectfully submitted,

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ADOPT ENCROACHMENT ORDINANCES
TRIBAL CODE CHAPTER 44 RESCIND
CDA 144(99) CDA RESOLUTION 333(99)

WHEREAS, The Coeur d'Alene-Tribal Council has been empowered to act for and on the behalf of the Coeur d'Alene Tribe pursuant to the revised Constitution and By-Laws, adopted by the Coeur d'Alene Tribe by referendum November 10, 1984, and approved by the Secretary of the Interior, Bureau of Indian Affairs, December 21, 1984; and

WHEREAS, the Federal Court has ruled in *U.S. and Coeur d'Alene Tribe v. Idaho* that the Tribe owns the submerged lands underlying navigable waters within the Coeur d'Alene Reservation at issue in that case; and

WHEREAS, it is in the best interest of the Tribe to regulate encroachment on and the use of tribal waters; and

WHEREAS, there has been a delay in finalizing the statutes that were to be attached to the CDA Resolution 144(99) dated April 8, 1999; and

NOW, THEREFORE BE IT RESOLVED, That the Coeur d'Alene Tribal Council hereby Rescind CDA Resolution 144(99) dated April 8, 1999, and That the Tribal Code is amended to repeal the existing Chapter 45 and adopt a new Chapter 44 as set out in the Attachment A; and

BE IT FURTHER RESOLVED, That an emergency exists and this resolution shall take effect retro to April 15, 1999.

CERTIFICATION

The foregoing amended resolution was adopted at a meeting of the Coeur d'Alene Tribal Council held at the Tribal Headquarters, 850 A Street, Plummer, Idaho, on August 12, 1999, with the required quorum present by a vote of [4] FOR [0] AGAINST

/s/ Ernest L. Stensgar	**/s/ Richard J. Mullen**
ERNEST L. STENSGAR, CHAIRMAN	**RICHARD J. MULLEN, SECRETARY**
COEUR D'ALENE TRIBAL COUNCIL	**COEUR D'ALENE TRIBAL COUNCIL**

Excerpts from Coeur d'Alene Tribal Code,

Chapter 44

ENCROACHMENTS CHAPTER

44-1.00 JURISDICTION AND INTENT

44-1.01 Jurisdiction. The Coeur d'Alene Tribe has exercised exclusive sovereignty and dominion over the submerged lands and waters within the area now known as the Coeur d'Alene Reservation since time immemorial. The submerged lands and waters within the Coeur d'Alene Reservation are owned by the Coeur d'Alene Tribe and the Tribe is legally entitled to the exclusive use and occupancy of them. *United States and Coeur d'Alene Tribe v. Idaho,* U.S.D.Ct. #CIV 94-0328-N-EJL, July 28, 1998. These submerged lands and waters are essential to the Tribe's "dignity and ancient right." *Coeur d'Alene Tribe v. Idaho,* C.A. No. 92-36703, 42 F.3d 1244 (1944) *reversed*

521 U.S. 261 (1997). As such the regulation of use of the submerged lands and waters are an essential governmental function of the Tribe. The Tribal and public health, safety and welfare requires that any allowed use of and encroachment upon these waters and submerged lands be regulated to protect water quality and quantity, navigation, fish and wildlife habitat, aquatic life, aesthetic beauty and Tribal values.

44-1.02 Tribal Intent. Although the Coeur d'Alene Tribe has the right of exclusive use and occupancy and to exclude non-Tribal member uses of the waters and submerged lands within the Reservation, the Coeur d'Alene Tribe herein permits non-Tribal members the privilege to use these waters and submerged lands in certain specific, well-defined ways. This non-Tribal member use is by permission only and is to be narrowly construed. Except as specifically otherwise authorized in this Chapter, it is the intent of the Coeur d'Alene Tribe to reserve for enrolled members of the Coeur d'Alene Tribe the exclusive use and occupancy of all waters within the Coeur d'Alene Reservation and of all submerged lands underlying navigable waters within the Coeur d'Alene Reservation.

44-2.00 NO RIGHTS CONFERRED

No enforceable rights or privileges regarding use of the waters or submerged lands of the Coeur d'Alene Reservation are conferred by the Chapter on those who are not enrolled members of the Coeur d'Alene Tribe. All use of the waters or submerged lands by non-Tribal members are at the sole discretion of the Tribe. Permissive use by

non-Tribal members is allowed only to the extent specifically authorized by this Chapter. Additional uses are neither inferred nor implied and are denied.

44-3.00 DEFINITIONS

For the purposes of this statute, the following definitions are applicable.

44-3.02 Board means Coeur d'Alene Tribe Lake/River Board.

44-3.03 Boat Garage means any covered structure on Tribal waters with one or more solid sides.

44-3.04 Boom means a series of logs connected together to enclose an area of water.

44-3.05 Breakwater means any encroachment which is designed to protect the shore from wave action.

44-3.06 Buoy means a float or floating object moored to the submerged lands.

44-3.07 Commercial Marina means a facility which leases moorage space or water craft for recreational boating or other water related activities. [means an encroachment which rents or leases moorage space to individual boat owners.]

44-3.08 Compliance Order means any Order issued by the Natural Resource Department to a person directing the action.

44-3.09 Department means Natural Resource Department of the Coeur d'Alene Tribe.

44-3.10 Dock means any platform either floating or non-floating which extends into, over or across the waters to provide boat moorage, access to a moorage area, swimming facilities, or other related activities.

44-3.11 Dredging means the process of excavating materials from the submerged lands thereby altering the elevation of a portion of the submerged lands. The term includes the process of extending the water area landward by excavating material from the lake shore thereby allowing the waters to flow over areas they had not otherwise flowed.

44-3.12 Encroachment means any dock, pier, float home, boat garage, jetty, float, piling, breakwater, boat ramp, channel, basin, land fill, fill, sea wall or other structure on, in or above the submerged lands or waters of the Coeur d'Alene Reservation.

44-3.13 Fill means the process of discharging material into Tribal waters or upon the submerged lands and thereby raising the elevation of a portion of the submerged lands.

44-3.14 Float Home means any dwelling structure floating on Tribal waters that is affixed directly or indirectly to the shore or submerged lands and is not intended to be used primarily for navigation.

44-3.15 High Water Mark means the line, as of the date the Coeur d'Alene Reservation was opened to non-Indian homestead or thereafter below which action of the water renders the land not useful for agricultural purposes.

44-3.16 Jetty means a structure often in pairs which extends from the shoreline into the lake and is designed to confine the flow of water to a narrow zone.

44-3.17 Lease means a lease by the Tribe to a person authorizing use of Tribal waters or submerged

lands, underlying navigable waters pursuant to this Chapter.

44-3.18 Major Variance means a variance that violates a construction or design criteria or creates a major environmental impact. Any variance which does not qualify as a minor variance is also a major variance.

44-3.19 Minor Variance means a variance required by unusual circumstances *and* to which there is no reasonable alternative *and* which poses no adverse impact.

44-3.20 Multi-Family/Coop Dock means any dock owned by two or more individuals used to moor their individual boats.

44-3.21 Pier means a non-floating fixed platform extending out over the water from the shore which is attached to the shoreline or is connected with the shoreline by a gangway.

44-3.22 Piling means a pole or other object driven into the submerged lands.

44-3.23 Repair means to restore an existing encroachment to sound condition by replacing component parts of the encroachment.

44-3.24 Replacement means to rebuild an existing encroachment by removing that encroachment and constructing a new one.

44-3.25 Retaining Wall means any structure built parallel or contiguous to the shore line of Tribal waters which is designed to protect the land mass inland from erosion or wave action.

44-3.26 Rip Rap means a layer, facing or protective mound of stones, logs or other material randomly placed to prevent erosion, scour or slopping of a structure or embankment.

44-3.27 Sea wall means any structure at or below the high water mark designed to protect the area above the high water mark from wave action.

44-3.28 Staff means the employees, contractors or agents of the Coeur d'Alene Tribe charged with implement and enforcement of this Code.

44-3.29 Submerged lands means all lands lower than the high water mark of navigable waters.

44-3.30 Tribal Court means the Court of the Coeur d'Alene Tribe.

44-3.31 Tribal Expenses means those expenses above and beyond the routine costs incurred in processing applications, and includes expenses such as those incurred in major environmental reviews, environmental assessments, environmental impact statements, 404 permit applications, environmental testing and other such expenses.

44-3.32 Tribal Member means an enrolled member of the Coeur d'Alene Tribe.

44-3.33 Tribal Waters means all navigable waters within the Coeur d'Alene Reservation. These waters include, but are not limited to, the southern portion of Lake Coeur d'Alene, the southern portion of Black Lake, the St. Joe River downstream from St. Maries, Lake Chatcolet, Hidden Lake, Benewah Lake, Round Lake and Hepton Lake.

44-3.34 Tribe means Coeur d'Alene Tribe.

44-3.35 Water Use Permit means a permit which authorizes the use of the waters of the Tribe, regardless of navigability, subject to the right of water use permits which are superior as to quantity and priority date.

44-3.36 Wetland means the water land interface area which are inundated or saturated by surface and/or groundwater at a frequency or duration of time periods sufficient to establish, and under natural conditions, support a prevalence of vegetation typically adapted to life in saturated conditions. Wetlands generally include, but are not limited to, swamps, marshes, bogs and similar areas. Wetland areas may be separated from a main body of water by barrier or natural berm.

44-3.37 Wharf means a structure built on the shore of Tribal waters so that vehicles may lie alongside to receive and discharge cargo, passengers or other items.

44-4.00 WATERS/SUBMERGED LANDS REGULATED

The Coeur d'Alene Tribe regulates all submerged lands and waters wherever they come to be located within the Coeur d'Alene Reservation regardless of whether the watercourse is navigable or not and regardless of whether the watercourse is in its natural condition or has been altered by impoundment, dredging or otherwise.

* * *

Supreme Court, U.S.
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No. 00-189

In The

Supreme Court of the United States

STATE OF IDAHO,

Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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Case No. CV-94-00328-EJL

Docket No.	Date	Description
1	07/21/1994	COMPLAINT (Summons(es) issued) (consent notice issued/furnished).
4	08/09/1994	ANSWER to complaint [1-1] and COUNTERCLAIM by def Idaho, State of against pla USA; cntdft USA.
5	10/11/1994	ANSWER TO COUNTERCLAIM [4-2] by cntr-def USA.
6	10/21/1994	MOTION by Coeur d'Alene Tribe to intervene as a pla.
21	11/09/1995	MEMORANDUM, DECISION, AND ORDER: by Honorable Edward J. Lodge granting motion to intervene as a pla [6-1] denying motion to amend complaint and answer to counterclaim in intervention [17-1] and granting the Tribe leave to file a second amended complaint and answer consistent with the Court's discussion.
22	11/21/1995	ANSWER TO COUNTERCLAIM [4-2] by intvnpla Coeur d'Alene Tribe.
22	11/21/1995	SECOND AMENDED COMPLAINT [1-1] by intvnpla Coeur d'Alene Tribe.
23	12/11/1995	ANSWER by def Idaho, State of to second amended complaint in intervention.

28	05/17/1996	ANSWER TO COUNTERCLAIM [4-2] by intvpla Coeur d'Alene Tribe.
28	05/17/1996	THIRD AMENDED COMPLAINT [22-1] by intvpla Coeur d'Alene Tribe.
42	07/03/1997	MOTION by def Idaho, State of for summary judgment.
48	07/03/1997	NOTICE by intvpla Coeur d'Alene Tribe of intent to seek entry of default and default judgment against State of Idaho as to the Tribe's third amended complaint.
49	07/03/1997	MOTION by intvpla Coeur d'Alene Tribe for entry of default as to Idaho, State of and dispositive motions standards.
55	07/08/1997	ANSWER by def Idaho, State of to third amended complaint in intervention.
85	10/31/1997	ORDER by Honorable Edward J. Lodge denying motion for entry of default as to Idaho, State of and dispositive motions standards [49-1], denying motion for summary judgment [42-1].
108	12/01/1997	MINUTES OF COURT TRIAL-DAY 1 – finding moot the motion in limine to exclude all evidence offered at trial by the State of Idaho which addresses matters "following the 1873 designation of the CDA Reservation" [97-1], finding moot the motion to strike exhibits [97-2] Court Trial Began EJL.

109	12/02/1997	MINUTES OF COURT TRIAL-DAY 2 – EJL.
110	12/03/1997	MINUTES OF COURT TRIAL-DAY 3 – Denying Oral motion by pla's Rule 15B -Request for amendment of pleadings to include issue of ownership of entire lake. EJL.
111	12/04/1997	MINUTES OF COURT TRIAL-DAY 4 – EJL.
112	12/08/1997	MINUTES OF COURT TRIAL-DAY 5 – EJL.
113	12/09/1997	MINUTES OF COURT TRIAL-DAY 6 – EJL.
114	12/10/1997	ORDER by Honorable Edward J. Lodge that the Eleventh Amendment precludes adjudication of the CDA Tribe's ownership interest in the submerged lands of Heyburn State Park.
115	12/10/1997	MINUTES OF COURT TRIAL-DAY 7 – EJL.
116	12/11/1997	MINUTES OF COURT TRIAL-DAY 8 – EJL.
117	12/12/1997	MINUTES OF COURT TRIAL-DAY 9 – Trial ended EJL.
118	12/15/1997	NOTICE OF MOTION DETERMINATION PROCEDURE - motion in limine to exclude all evidence offered at trial by the State of Idaho which addresses matters "following the 1873 designation of the CDA Reservation" [97-1] and motion to strike exhibits [97-2] will be decided on written submissions.

132	07/28/1998	MEMORANDUM, DECISION, AND ORDER: by Honorable Edward J. Lodge 1. Title is quieted in favor of the USA, as trustee, and the CDA Tribe of Idaho, as the beneficially interested party of the trusteeship, to the bed and banks of the CDA Lake and the St. Joe River lying within the current boundaries of the CDA Indian Reservation; 2. The USA, as trustee, and the CDA Tribe of Idaho, as the beneficially interested party of the trusteeship, are entitled to the exclusive use, occupancy and right to the quiet enjoyment of the bed and banks of the CDA Lake and the St. Joe River lying within the current boundaries of the CDA Indian Reservation; and 3. The State of Idaho is permanently enjoined from asserting any right, title or otherwise interest in or to the bed and banks of the CDA Lake and St. Joe River lying within the current boundaries of the CDA Indian Reservation. It is further ordered that the State of Idaho's counterclaim is denied [4-2] Pla's to submit a proposed judgment and decree; Case Mgmt ddl set for 8/11/98.
135	08/14/1998	JUDGMENT AND DECREE by Honorable Edward J. Lodge Judgment for pla in intervention, CDA Tribe; Costs are awarded to the CDA Tribe. By agreement the USA and the State of Idaho shall bear their own costs terminating case.

136	08/18/1998	MOTION by def Idaho, State of for stay and injunction pending appeal.
139	08/18/1998	NOTICE OF APPEAL by defendant Idaho, State of from Dist. Court decision [135-2], [132-2].
142	08/24/1998	NOTICE OF CROSS-APPEAL by intervenor-plaintiff Coeur d'Alene Tribe from Dist. Court decision [132-2], [135-2].
156	10/19/1998	ORDER by Honorable Edward J. Lodge denying motion for stay and injunction pending appeal [136-1].
158	05/31/2000	MANDATE from Circuit Court of Appeals affirming the decision of the District Court on appeal [142-1], affirming the decision of the District Court on appeal [139-1].

Relevant Docket Entries
United States of America et al. v. Idaho
United States Court of Appeals for the Ninth Circuit
Case Nos. 98-35831, 98-35847

Date	Description
8/28/98	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL [98-35831].
9/1/1998	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL [98-35831, 98-35847].
12/9/1999	ARGUED AND SUBMITTED TO Thomas M. Reavely, Stephen R. Reinhardt, M.M. McKeown [98-35831, 98-35847].

05/02/2000	FILED OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Thomas M. Reavley; Stephen R. Reinhardt; M.M. McKeown, author) FILED AND ENTERED JUDGMENT. [98-35831, 98-35847].
05/31/2000	MANDATE ISSUED [98-38831, 98-35847].

DOCKET 135

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

In re suit to quiet title to that portion of the bed and banks of Coeur d'Alene Lake and St. Joe River lying within the exterior boundaries of the 1873 Cour d'Alene Reservation	Case No. CIV-94-0328-N-EJL
UNITED STATES OF AMERICA, Plaintiff, Counterdefendant and COEUR D'ALENE TRIBE, Plaintiff in Intervention, Counterdefendant in Intervention vs. STATE OF IDAHO, Defendant, Counterclaimant.	JUDGMENT & DECREE (Filed Aug. 14, 1998)

This action came on for trial before the Court, Honorable Edward J. Lodge, United States District Judge, presiding, from December 1 through December 12, 1997, and the issues having been duly heard and a July 28, 1998, MEMORANDUM DECISION AND ORDER having been duly rendered,

IT IS ORDERED, ADJUDGED AND DECREED that:

1. Title is quieted in favor of the United States, as trustee, and the Coeur d'Alene Tribe, as the beneficially interested party of the trusteeship, to the bed and banks of all of the navigable waters lying within the current boundaries of the Coeur d'Alene Indian Reservation as those boundaries are described by the Act of March 3, 1891, 26 Stat. at 1027 and the Act of August 15, 1894, 28 Stat. at 322, which includes portions of Lake Coeur d'Alene and the St. Joe River, but which exclude those bed and banks of the navigable waters claimed by Idaho to be within Heyburn State Park, which waters and submerged lands were not at issue in this litigation;

2. The United States, as trustee, and the Coeur d'Alene Tribe, as the beneficially interested party of the trusteeship, are entitled to the exclusive use, occupancy and right to the quiet enjoyment of the bed and banks of all of the navigable waters lying within the current boundaries of the Coeur d'Alene Indian Reservation as those boundaries are described by the Act of March 3, 1891, 26 Stat. at 1027 and the Act of August 15, 1894, 28 Stat. at 322, which includes portions of Lake Coeur d'Alene and the St. Joe River, but which exclude those bed and banks of the navigable waters claimed by Idaho to be within Heyburn State Park, which waters and submerged lands were not at issue in this litigation;

3. The State of Idaho is permanently enjoined from asserting any right, title or otherwise interest in or to the bed and banks of all the navigable waters lying within the current boundaries of the Coeur d'Alene Indian Reservation as those boundaries are described by the Act of

March 3, 1891, 26 Stat. at 1027 and the Act of August 15, 1894, 28 Stat. at 322, which includes portions of Lake Coeur d'Alene and the St. Joe River, but which exclude those bed and banks of the navigable waters claimed by Idaho to be within Heyburn State Park, which waters and submerged lands were at issue in this litigation;

4. The State of Idaho's counterclaim is denied;

5. For such other and further relief in accordance with the aforementioned July 28, 1998, MEMORANDUM DECISION AND ORDER, which by this reference is incorporated herein as if set forth verbatim; and

6. Costs are awarded to the Coeur d'Alene Tribe. By agreement the United States and the State of Idaho shall bear their own costs.

DATED this 14th day of August, 1998.

/s/ Edward J. Lodge
EDWARD J. LODGE
United States District Judge

CR 94-0328-N-EJL

VOLUME V

COURT TRIAL

DECEMBER 8, 1997

BEFORE THE HONORABLE EDWARD J. LODGE

AT BOISE, IDAHO

[TESTIMONY OF ANTHROPOLOGIST EXPERT WITNESS DR. SPRAGUE]

* * *

[806] **Q** In 1873 were the Coeur d'Alene people dependent for survival on the fishing [807] specifically and the water generally of Lake Coeur d'Alene and all of the related waters within their area?

A Yes, they were.

Q Have you studied the dependency for survival on the fishing specifically and the water generally of other traditional economies of the plateau Tribes neighboring the Coeur d'Alene Tribe?

A Yes, I have.

Q And I would like to ask you to compare the Coeur d'Alenes with one other plateau tribe and one other tribe that is close to the plateau, that is, the Crows in Montana who are not really a plateau tribe, are they?

A No, they're plains, great plains.

Q And the Salish, Kootenai, the now Flathead Reservation in Canada, they are plateau tribes, are they not?

A Yes, they are.

Q And the Coeur d'Alenes. How would you compare those three peoples as to their comparative dependence for survival on the fishing specifically and the waters generally?

A They form an interesting continuum [808] from east to west. The Crow have a typical plains dislike of fish. They consider fish things like suckers and bullheads that live in the mud and they simply don't depend on fishing at all. They're entirely dependent upon the bison. The Flathead are an intermediate group that are dependent on fishing, but not to the extent the Coeur d'Alene are, and they have to go over into the Salmon area shared with the Nez Perce in order to get enough Salmon in order to survive for a year. They simply don't have that much in their own territory, in their own lakes, in contrast to the Coeur d'Alenes who don't have to move out of the area, have plenty of resources in the area, and these resources come largely from the lake.

Q Given your studies of cultures of native people, do you have an opinion as to whether an Indian tribe as dependent for survival on the fishing specifically and water generally as the Coeur d'Alenes were in 1873, would have agreed to a reservation that did not include lakes and rivers that had been the heart of their lives?

A I would say that this is inconceivable [809] that they would agree to such a situation. My feeling is that they assumed any reservation included the water.

Q When the Coeur d'Alene were drawing boundary lines with the United States negotiators in 1873 did they see those boundary lines really as being any different

than the boundary lines that had existed between the Coeur d'Alene people and neighboring tribes earlier?

A No, I think they viewed them essentially the same – smaller, but the same type of boundary.

Q Would they have thought that anything inside those lines would ever belong to anyone other than Coeur d'Alene people?

A No, I don't think they would have.

MR. GIVENS: No further, questions, Your Honor.

* * *

[TESTIMONY OF SURVEYOR EXPERT WITNESS PROFESSOR WILLETT]

[897] [T]he actual blow-up here and the actual Exhibit 2281, are there small circles and lines connecting those circles down the middle of the channel of the Spokane River?

A Yes, there is.

Q Looking at the map on the screen, or this one right here, maybe that's easier to look at, does the map indicate the acreage inside the reservation?

A Yes, it's over 598,000 acres inside the boundary, I believe – 598,499.85 acres.

Q Have you calculated the water – the acreage of the submerged lands underlying the navigable waters of the reservation?

A The submerged lands of this exhibit? I calculated the acreage in the reservation. I have not calculated the

submerged lands, but there is other information available.

Q You have reviewed that other information?

A Yes.

Q Does this acreage figure that is shown on the face of map, 598,499.85 acres, does that represent the entire acreage within the exterior boundaries shown on the map?

[898] **A** Yes, it does, I checked that twice earlier and I checked it on a smaller drawing and came within 6 percent of the acreage. Recently I used a larger, full-scale drawing and mathematically, using the bearings and distance of the survey came up with a figure of around 610,000 acres which is within 2 percent of the acreage, so that acreage correctly represents the acreage within the boundaries of the Coeur d'Alene Indian reservation at that time.

Q It includes the submerged lands?

A It includes the submerged lands.

Q With your little red dot pointer could you indicate on Exhibit 2281 where Lake Coeur d'Alene is on the – if you would use this exhibit?

A The lower end is down here as shown on the map and then up here through this area showing the Coeur d'Alene Lake.

MR. GIVENS: Your Honor, could the record show that the witness is indicating the lake lies directly underneath – or in other words, the Coeur d'Alene Indian reservation area, 598,499.85 acres is printed.

THE COURT: Hearing no objection, the [899] record may so show.

MR. GIVENS: Thank you.

BY MR. GIVENS:

Q If the surveyor, Mr. Baker, had surveyed the reservation in such a way as to exclude the lake from the reservation, as we discuss it maybe we could use one of these other maps here, maybe use 2339 because it shows the lake there. Let's take it as it goes along the northern boundary, what would he have done as he was surveying the northern boundary when he hit the water?

A If his instructions had been to exclude the Coeur d'Alene Lake, it was naturally large enough that he considered it a navigable lake, then he would have had to meander a line along the lake there starting from here all the way around the lake and also I assume he would have to go up to the St. Joe and back along the west border and back up to the Spokane River.

Q Thank you. In 1889 the Coeur d'Alene Tribe and the United States, as has been testified earlier, reached agreement on a cession of some land in the northern part of the 1873 reservation. In 1891 did W. Clayton Miller [900] survey the area of that cession?

A Yes, he did.

Q If we look at Exhibit 2298, which is one of the maps standing up there, is the area of that cession as the U.S. understood it the area to the north that is shaded?

A Correct, this area which has been shaded.

Q Have you reviewed the actual plat maps that were done pursuant to W. Clayton Miller's survey?

A Yes, I have.

Q Let's talk first about the portion of that survey regarding the Spokane River.

MR. GIVENS: And could the witness be handed Exhibit 2393, please, just that one, 2393.

BY MR. GIVENS:

Q Do you have that there?

A Yes, I do.

Q If we could direct our attention to the northern part of that area where it shows the Spokane River leaving Lake Coeur d'Alene. Did Mr. Miller – what does this exhibit show?

A It shows that the south shore or the left-hand bank of the Spokane River was meandered [901] by Mr. Miller, Clayton Miller, in the 1891 survey.

Q Why was it meandered?

A Because it is a navigable river.

Q If we could then, looking at that same exhibit, go down and look at the line across Lake Coeur d'Alene further south, maybe it's another page of the exhibit – do you have that there in Exhibit 2393?

A I have 2393 and it's the same as the image, then there is – well, there is another township and range adjacent to this one.

Q Let's move on past that then. When Miller surveyed – let's use 2298 to discuss this – when Miller surveyed the southern portion of the cession or the northern boundary of the Coeur d'Alene reservation that would remain after the cession, looking at Exhibit 2298, what did he do?

A As he was instructed, he started at milepost 75 which was along the Idaho-Washington territorial border which is approximately 12 miles south of the Spokane River. He surveyed a line due east until it intersected Lake Coeur d'Alene and then he directed to follow Lake Coeur [902] d'Alene which would be a meandering line down the west shore of Lake Coeur d'Alene until he got to a point which was west of the entrance of the Coeur d'Alene River, and then through triangulation he crossed the lake and then surveyed the line due east until it intersected the east boundary of the 1873 survey by Baker.

Q If the intent at that point had been to exclude the remainder of the southern portion of Lake Coeur d'Alene from the Coeur d'Alene reservation, how would the survey have been different from the point that he reached the west shore of Lake Coeur d'Alene?

A When he reached the west shore of Coeur d'Alene then he would have continued a meander line down along the west shore of the lake and more than likely, since the St. Joe would have been considered a navigable river he would have surveyed a line down to the reservation line on the St. Joe and then back up until he intersected that point then continued due north.

Q In addition, Mr. Miller surveyed an area that Congress had granted to a gentleman by the name of Frederick Post in 1891, did he not?

[903] A Yes, he did.

MR. GIVENS: Could the witness please have Exhibits 771 and 838.

BY MR. GIVENS:

Q 771 are the field notes; did you review those field notes, sir?

A Yes, I have.

Q And then direct your attention Exhibit 838?

A Yes.

Q This is a transcript of the actual patent and then attached to that there is a map, is there not?

A Yes, this is the patent to Frederick Post and a map of the property he was deeded.

Q Looking at this map, – let me back up. I believe this is a picture of it, but the written text of the patent makes reference to an affidavit from Chief Seltice where he references a sale by the Tribe to Frederick Post of this area of land in 1871, does it not?

A Yes.

Q Does that make specific reference to the river channels?

A Yes.

[904] **Q** When Miller surveyed this Post patent in 1891 did he survey the – well, let me ask it this way. How did he deal with the survey of both the upland and the river channels within the area that was patented to Frederick Post?

A Within the area that was patented to Frederick Post, both the upland and the submerged land were all included within the acreage.

Q Have you examined the acreage figures that are shown on this map and the acreage figures of the waters and compared them to the total acreage that the prior portion of this exhibit confirmed was the property of Mr. Post?

A Yes, I did. Using the acreage of that Item No. 1 as a guide for acreage, I determined the acreage of the survey lines around the patent and came within 2 percent of the figure used toward the end of the patent year of the total amount of acreage there that he gained was 298 acres and 394 thousandths of an acre. And I got within 2 percent of that acreage.

Q Did the patent that is part of this exhibit, the patent to Mr. Post, not only the uplands but also the submerged lands as shown in this map?

[905] **A** Right, the area across the river and then up around the meander line and then across the river again, and again around the meander line and then back to that point. This is the property he gained in that patent.

Q Moving on to the survey of what has been previously referred to as the Harrison strip, I would direct your attention to Exhibit 2334 which is the map closest to

the bench sitting down in front of the jury box. There has been previous testimony in this case that that strip of land was ceded pursuant – by the Tribe to the United States pursuant to an agreement in 1894. Did a gentleman by the name of Harold Rands survey this Harrison strip in 1901?

A Yes he did.

MR. GIVENS: Could the witness have Exhibit 793, 2394 and 140, please.

BY MR. GIVENS:

Q 793 are the field notes from Mr. Rands' survey; have you reviewed those, sir?

A Yes, I have.

Q Could you bring up Exhibit 2394, please. Is a part of that exhibit instructive to us?

[906] **A** Yes. There's a number of plats here which show the north boundary of the reservation and the east side of the Coeur d'Alene lake. At this point he works from the east towards the west and the way the maps are here, and this is the corner where he –

Q Where he starts at?

A Where he starts at – well, actually where it ended up. I mean, the survey ran from Harrison to the east.

Q And could we have Exhibit 140 brought up on the screen, please. What does this detail show?

A This is the area of Harrison at the beginning of the survey, where he started out actually, Rands, when he

was reviewing the survey, he traced the old boundary because the new boundary would be one mile south of it, and starting out the boundary, actually the first corner would have probably fallen into the lake there so he had to go to milepost 30 and it was a little beyond milepost 30 to get an offset that would not be in the lake.

Q Would you indicate where milepost 30 is?

[907] **A** I believe it is in that area – that looks like 29, I can't read it. But in this general year he offsets down and sets his line one mile south and parallel, so when they drafted this up they drafted it as being south one mile and this is the Indian reservation line right here which would be the new Harrison strip boundary line.

Q If the intent had been to – let me back up and let's put this in perspective. Idaho became a State in 1890, that would have been 11 years before this survey, wouldn't it?

A Correct.

Q If the understanding was that Idaho at that time owned Lake Coeur d'Alene would the survey have been drawn like it was in this exhibit?

A No. If that had been the understanding they would have used the meander line along that shoreline rather than to show the boundary out in the lake.

Q Would you read the words that cut through the corner kind of on the diagonal of the exhibit?

A Coeur d'Alene Lake, and then the [908] boundary of the Coeur d'Alene Indian reservation is shown below that.

Q That's those words shown right out like this?

A Correct.

Q And your knowledge of this area, sir, is – were the words "boundary of the Coeur d'Alene Indian reservation," is that actually in Lake Coeur d'Alene?

A That would be in Lake Coeur d'Alene, yes.

Q I would like to discuss generally for a moment the similarities between the Post patent map you just discussed a moment ago and all of the Coeur d'Alene reservation maps that you have – maps from the surveys of different borders of the reservation that we just discussed. In what ways are the maps taken from the surveys of the reservation lines similar to the mapping we discussed a moment ago of survey of the Post patent?

A Basically two general similarities would be that where the lines crossed the water over the bed that they were surveyed across the water and not meandered. The other is that all [909] the both bed and land within the boundaries were included in the survey, there was not an attempt to, as far as the description of the boundaries, that includes all the land within those boundaries.

Q In terms of how those two categories of surveys dealt with ownership of submerged lands, were there any differences?

A No, the ownership in both cases were before Idaho became a state, so they're essentially a grant of land for statehood, they came with the property.

Q After reviewing the instructions and field notes, official maps and various boundaries of the Coeur

d'Alene reservation which we discussed, do you have an opinion as a surveyor as to whether those official surveys and resulting maps demonstrate an intent that the land surveyed under the navigable waters within the lines were intended to be part of the Coeur d'Alene reservation along with other lands within the Coeur d'Alene reservation?

A In my opinion, from the way it was surveyed and the instructions, that all of the Indian water within the boundaries, the navigable [910] water within the boundaries would be part of the reservation.

Q As a surveyor, do you have an opinion as to whether or not Spokane River east of the Washington – Idaho border was navigable?

A Yes, it is navigable, otherwise it wouldn't have been surveyed as it was.

MR. GIVENS: Thank you. I have no other questions.

* * *

EXHIBIT 208

THE

EXECUTIVE DOCUMENTS,

PRINTED BY ORDER OF

THE SENATE OF THE UNITED STATES,

SECOND SESSION, THIRTY-FIFTH CONGRESS,

1858-'59,

AND

SPECIAL SESSION OF THE SENATE OF 1859.

* * *

Preliminary articles of a treaty of peace and friendship between the United States and the Coeur d'Alene Indians,

ARTICLE 1. – Hostilities between the United States and the Coeur d'Alene Indians shall cease from and after this date, September 17, 1858.

ARTICLE 2. – The chiefs and headmen of the Coeur d'Alene Indians, for and in behalf of the whole nation, agree and promise to surrender to the United States all property in their possession belonging either to the government or to individuals, whether said property was captured or abandoned by the troops of the United States.

ARTICLE 3. – The chiefs and headmen of the Coeur d'Alene nation agree to surrender to the United States the men who commenced the battle with Lieutenant Colonel Steptoe, contrary to the orders of their chiefs, and also to give at least one chief and four men, with their families, to the officer in command of the troops as hostages for their future good conduct.

ARTICLE 4. – The chiefs and headmen of the Coeur d'Alene nation promise that all white persons shall travel through their country unmolested, and that no Indians hostile to the United States shall be allowed within the limits of their country.

ARTICLE 5. – The officer in command of the United States troops, for and in behalf of the government, promises that if the foregoing conditions are fully complied with no war shall be made upon the Coeur d'Alene nation; and further, that the men who are to be surrendered, whether those who commenced the fight with Lieutenant Colonel Steptoe or as hostages for the future good conduct of the Coeur d'Alene nation, shall in nowise be injured, and shall, within one year from the date hereof, be restored to their nation.

ARTICLE 6. – It is agreed by both of the aforesaid contracting parties that when the foregoing articles shall have been fully complied with, a permanent treaty of peace and friendship shall be made.

ARTICLE 7. – It is agreed by the chiefs and headmen of the Coeur d'Alene nation that this treaty of peace and friendship shall extend also to include the Nez Percés nation of Indians.

Done at the headquarters of the expedition against northern Indians, at the Coeur d'Alene mission, Washington Territory, this 17th day of September, 1858.

G. WRIGHT,
Colonel 9th Infrantry, commanding.

Mil-kap-si,	his x mark.	Paul,	his x mark.
Sal-tize,	his x mark.	Bonaventure,	his x mark.
Vincent,	his x mark.	Cassimere,	his x mark.
Joseph,	his x mark.	Bernard,	his x mark.
Jean Pierre,	his x mark.	Anthony,	his x mark.
Pierre Pauline,	his x mark.	Leo,	his x mark.
Louis Margoni,	his x mark.	Patricia,	his x mark.
Cypronani,	his x mark.	Pierre,	his x mark.
Augustin,	his x mark.	Jean Pierre,	his x mark.

Witnesses.

E.D. KEYES, *Captain 3d Artillery.*
W.N. GRIER, *Brevet Major United States Army,*
R.W. KIRKHAM, *Captain and Assistant Quartermaster.*
F.F. DENT, *Captain 9th Infantry.*

EXHIBIT 300T

Department of the Interior
Received Mch 7th, 1873
Dated _____, 187___.
From Chiefs of the
Coeur d'Alene Inds.

SUBJECT

Concerning the
allotment of their
lands, etc.
(Illegible name)

ACTION
File Mch 7, 1873.

Respectfully referred to the
Acting Com'r of Ind. Aff.
[Round seal w/
illegible writing
across seal]

illegible
___ar
1873
Indian Office

Acting Chief Clerk.
Registered, Vol. 9, p.188 (illegible) 159

We chiefs and people of the Coeur d'Alene beg of the Great Chief to listen to our words already we did write last winter requesting a part of our land to be allotted for our own exclusive use, we got no direct answer; only we hear vague reports, then something has been granted, but some few white men have already trespassed on it though very little as yet: now allow us to speak once more.

In our first petition we made no mention of our church nor of the two valleys of S. Joseph, and Coeur d'Alene rivers, because in our ignorance we thought it a matter of course. When 30 winters past we had received the Word of God, we set to work to build him a house: it is very dear to us for many reasons: it is the work of our own hands, and we feel some way proud of it: but more than this, since that time many of our parents, our children, our relatives and friends our fellow believers have been buried near that Church and never for a moment could we have harboured (sic) the thought of abandoning it.

As to the two valleys, we did not think to ask for them, though they have been from old the habitual residence of most of us; because being every spring under water, we thought no white man could ever settle there in fact there is none as yet: the few spots which usually escape being inundated, we have them fenced in and cultivated. What we are unanimous in asking besides the 20 square miles already spoken of, are the two valleys, the S. Josephs, from the junction of S. and N. forks, and the Coeur d'Alene from the Mission inclusively. It would appear too much and it would be so if all or most of it were fit for farming but the far greatest part of it is either rocky or too dry, too cold or swampy; besides we are not as yet quite up to living on farming: with the work of God we took labor too, we began tilling the ground and we like it: though perhaps slowly we are continually progressing; but our unaided industry is not as yet up to the white man's. We think it hard to leave at once old habits to embrace new ones for a while yet we need have some hunting and fishing.

Moreover we have friendly neighbours (sic) using about the same language, who, we doubt not, would much rather join us, than to go with people of a different language the ___ camps of Spokanes we would welcome; and they would find hard to go with the Okanagons.

We would think too to have some kind title to what we are asking for. When 14 winters ago, deceived by false reports we had foolishly, against the warnings of our teacher, gone to war against the white man, having been rooted by the White head, Colonel Wright, we were keeping aloof: but the priest sent us word that the chief had promised to kill nobody if they would come to him and that there is no cheating in the soldier chiefs: then we met him with all our family near the Church: we made mutual promises and they were written on two papers: he kept one and handed us the other: on it, it is written that we should allow the people to pass freely through the land, to cut wood without ever molesting them and that the land should remain ours.

Since that we have always remembered our promise: We chiefs have always been ___ that our people should behave well; and when lately many white men came and settled on what we thought our own land they have never been disturbed we confidently appeal to the testimony of the settlers on Pine creed: let them say whether they found us good neighbors or not.

Therefore we hope you will grant us this bit of land, and we will feel thankful for it. We know you do help other Indians with tools, clothing and food: there is only one thing we might need: we want Brothers and Sisters to educate our children perhaps we won't yet be able to

maintain them: but about that we intend to write at another time: for all the balance we choose rather to depend on our own hands.

We wish very much too that early in the spring Mr. Simms agent at Colville, or another whom you might appoint would come and visit the land, see what we ask for, and what we have done already. Uncertainty tends to paralyze our people when certain of a home they will work with new energy.

From the Coeur d'Alene Mission this 18th day of November 1872.

We undersigned are witnesses of
the handmarks of the Chiefs.

J. Joset

Andrew X Seltis

EXHIBIT 305T

May-6th 1873–

Hon. L. F. Cartee
Surveyor General

I have just had a talk with Rev. Father Cataldo in regard to the Coeur d'Alene Indian Reservation where he has lived for several years past and I know he represents the views of the Indians.

The old mission on the St. Josephs River has been abandoned by them many years ago. The new mission or rather the Mission (as there is but one) is on the Coeur d'Alene River distant some 15 miles from the St. Josephs River. The section of country to be included is almost worthless as an agricultural country but will include the fisheries on the Lake and on the St. Josephs River. To run to the old mission would not include the fisheries on either the Lake or river.

I think the matter should be arranged before the reservation line is run. Should the fisheries be excluded there will in my opinion be trouble with these Indians but should they be included and also the mission which should also be in the Reservation there will be no trouble.

I send you a rough diagram of what the Reserve should be. I have never been at the Lake or at the Mission but from all I can ascertain I think the diagram is about correct and if the Reserve is made as I propose no settlers will be included. As the boundary is not yet run and I cannot make the survey until it is run there will be time to change the boundary as proposed.

Yours Respectfully
W. Thompson
Dept Surveyor

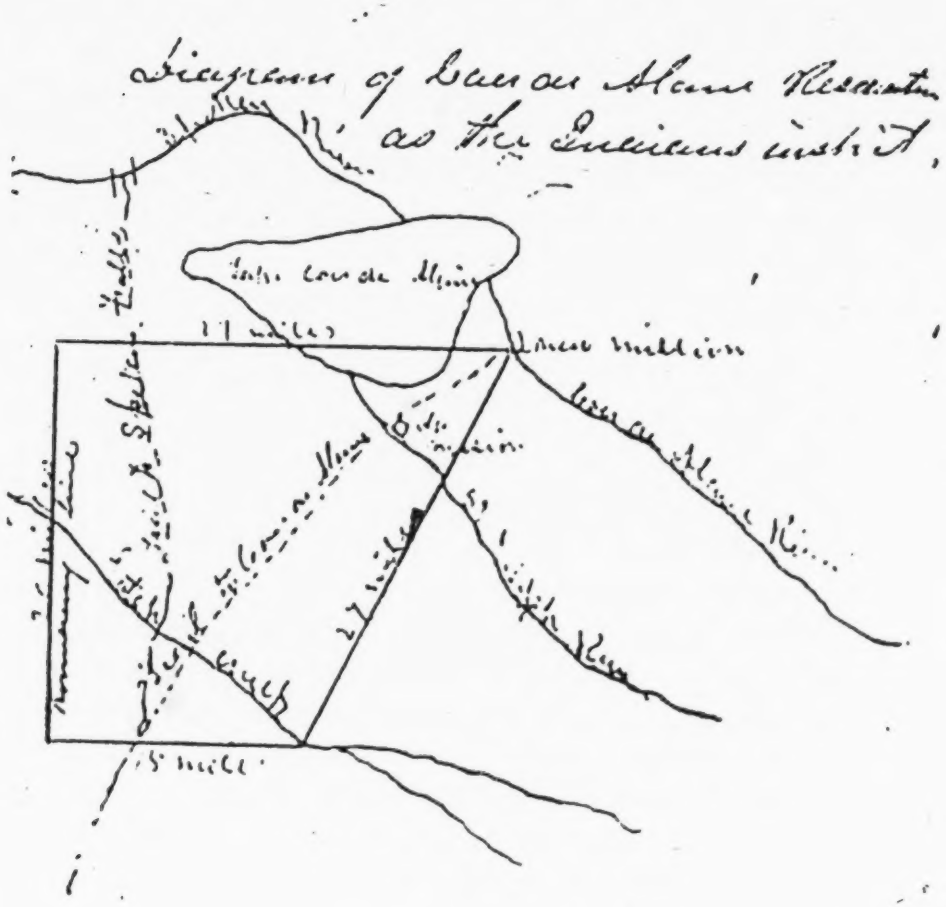


Diagram of Lewis and Clarks Reservation
as the Indians visit it.
Lake Lewis de Maria
11 miles
Lewis Willow
Lewis and Clarks River
Lewis and Clarks River
12 miles
5 miles

EXHIBIT NO. 645T

Office Indian Agent,
Nez Perce Indians,
Lapwai, Idaho Territory, August 1, 1873

C. Delano, Sec of Interior
My Dear sir:

We have seen the Coeur *d'Alenes* and made in *conjunction* with Mr. Monteith an agreement with them to be submitted to you and to Congress. Gerry Chief of the Spokanes is here now and is intensely Protestant. There is much trouble between the Catholics and Protestants on the various reservations.

A copy of a letter purporting to have been written to you by Charles Earing [Ewing] and commuted on by Blulette [Brouillet] a Catholic priest of Washington is circulated here in which it is claimed that you will favor the Catholics with an inspector appointed specially in their sympathy and it is told by Cataldo another priest at Coeur d'Alene that the inspector is the Catholic (he so told _____ and myself). And among other matters of like trouble among the Indians and going to retard them progress by dividing them is circulated throughout this country – General Shirley superintendent of Indian Affairs wrote me Wednesday from Walla Walla urging that I go to Colville to meet these Indians at that place on the 10th. If I can I will but must miss the Shoshones and Bannocks at Kammas Prairie on the 25th just – we will make our effort in full when through –

I only write now to call your attention briefly to the troubles as stated above and to ask you not to permit a survey of the Coeur d'Alene Reservation until our report

is in and do not close any arrangement with the Spokanes especially until our report and until their chief Gary can be heard from by you by letter or otherwise.

The letter purporting the from Charles Earing [Ewing] does not do him and his people full justice.

We will report to you the character of the surveying that has been done on Reservations here.

With High regards

J.P.C. Shanks

Agreement made and entered into on this 28th day of July, A.D., 1873, at Latah (or Hangman's) Creek, in the Territory of Idaho, by and between John P.G. Shanks, John B. Monteith, and Thomas W. Bennett, Special Commissioners on the part of the government of the United States, and the chiefs and head men of the Tribe of Coeur d'Alene Indians.

WITNESSETH:

ART. FIRST:

That the Government of the United States agrees to set apart and secure as a Reservation for the exclusive use of the Coeur d'Alene Indians, and to protect the same from settlement or occupancy by other persons, all and singular, the lands and privilege, lying and being within the following described limits to wit: Beginning at a point on the top of the dividing ridge between Pine and Latah (or Hangman's) Creeks, directly south of a point on said last mentioned creek, six miles above the point where the trails from Lewiston to Spokane Bridge Crossed said creek; thence in a North Easterly direction; in a direct

line, to the Coeur d'Alene Mission, on the Coeur d'Alene river (but not to include the lands of said Mission); thence in a westerly direction, in a direct line, to the point where the Spokane River heads in or leaves the Coeur d'Alene lake; thence down along the center of the channel of said Spokane River to the dividing line between the Territories of Idaho, and Washington, as established by the act of Congress organizing a Territorial government for the Territory of Idaho; thence South along said dividing line to the top of the dividing ridge between Pine and Latah (or Hangman's) Creeks; thence along the top of said ridge to the place of beginning.

Which said Reservation the government of the United States, upon the acceptance of this agreement by Congress shall cause to be surveyed at its own expense, and the boundaries fully defined in accordance with this agreement. Provided that the said government reserves the right to establish in and across said reservation mail routes, military roads, and public highways for the benefit of the citizens of the United States. And provided further that the water running into said reservations shall not be turned from their natural channel where they enter said reservation.

SECOND

And the said Tribe of Coeur d'Alene Indians agree to relinquish to the government of the United States all their rights and title in and to all the lands heretofore claimed by them, and lying and being outside of said described reservation, which said lands are boundaries as follows to

wit: Beginning at the head of the upper Palouse or Mod-
_____sha River in the Territory of Idaho; thence westerly across the ridge to Steptoes Butte; thence Northerly to Antoine Clements Plants on the Spokane river; thence across ridge to foot of Pend d'Oreille Lake; thence up said lake to the summit of the Bitter Root Mountains; thence along the summit of the Bitter Root Mountains to the place of beginning. And said Indians agree to locate and make their homes upon the reservation described in the first article of this agreement. Provided that when the dividing line between the Territories of Washington and Idaho shall have been established by neutral survey, if it shall be found that any of said Indians shall have made improvements on lands situated in the Territory of Washington, the government of the United States agrees to pay the value of such improvements to the Indians who may be at the time the owner thereof. Said value to be ascertained and said payments to be made as may be directed by the Secretary of the Interior.

THIRD

In consideration of the relinquishment of the title to all the lands described in article second of this agreement by said Indians, now in consideration of their removal within the reservation, described in article first of this agreement, the government of the United States agrees as soon after the approval of this agreement as practicable, to furnish to said Indians, at said reservation, the following articles to wit:

10 wagons; 10 setts wagon harness; 50 sett plow harness; 50 ten inch plows; 10 span American manes; ten whip

saws; 10 cross cut saws; 2 mowers with reapers combined; 1 sett blacksmith tools; 2 horse rakers; 20 harrows; 10 grain cradles.

Also to furnish materials and construct on said reservation for the use of said Indians 1 grist and saw mill combined; 1 school house with apartments for male and female pupils; 1 boarding and lodging house for pupils; 1 smith shop.

And the United States further agrees to furnish in United States 5 percent bonds the sum of One Hundred and Seventy Thousand Dollars, the interest to be paid annually, first for the payment of the salaries of the millers and blacksmith herein after provided for, and the residue to be expended under the direction of the President of the United States for schools and for such articles of comforts and for the civilization of said Indians as he may deem proper. *Provided,* the United States reserves the right to pay said principal sums to said Indians at any time after twenty years. And the United States agrees to furnish to said Indians, 1 grist and 1 saw miller and 1 blacksmith to be paid out of interest funds as above provided until such time as said Indians shall determine to dispense with the services of such employees. Said employees to teach the Indians to perform such labor.

FOURTH

It is expressly agreed by and between the said Commissioners and the said Indians, that this agreement shall be submitted to the Congress of the United States, for its approval, and in case the same shall be approved; it shall thereafter be binding and of full force and effect, but if

the same shall not be approved, then it shall be null and void and of no effect.

Done and Signed on this 28th day of July, A.D. 1873, in general council, at Latah (or Hangman's) Creek in the Territory of Idaho.

John P. Shanks
Witness

____Monteith

P. B. Whitman
F. M. Cataldo, P.S.

L.W. Bennett
Commissioners

Andrew Seltis Head Chief
(his mark)
Vincent Choshini Head Chief
(his mark)
Damas
(his mark)
Edward
(his mark)
Regis
(his mark)
Prine
(his mark)
Veucils
(his mark)
Bartholumi
(his mark)

Interpreters' name –

P.B. Whitman
Morris – a Nez Perce

EXHIBIT 704

10/4/1873
GOVERNOR BENNETT'S LETTER.

BOISE CITY, I. T. Sept. 18, 1873.

EDITOR SIGNAL – *Sir*: – I have just read an editorial in your paper of the 13th inst. in reference the "Coeur d'Alene Reserve." Your article contains so much that is calculated to misinform the people and do injustice to Gen. Shanks that I deem it not improper to offer a correction of statements that I am sure were made under misapprehension.

In the first place there never was a reservation provided these Indians that was binding on them. The President, by an executive order, had defined the boundaries of one and the Indians refused to accept of it. Gen. Shanks and myself were directed by the Secretary of the Interior to see these Indians and ascertain what were their desires and learn what compensation would induce them to cede to the Government all their title to lands outside the reservation, and to retire within their reservation. We found that the Indians *demanded* an extension of their reservation so as to include the Catholic Mission and fishing and mill privileges on the Spokane River. And yet you declare that the Indians did not ask for an extension of reservation.

The reservation as proposed by the executive of the President included a portion of the Pine Creek Valley and consequently many settlements. The proposed new reservation, by the full-consent of the Indians, will have its

southern boundary along the top of the dividing ridge between Pine and Hangman's creeks, thus leaving out the whole of the Pine Creek Valley and the settlers in it. Yet, you say exactly to the contrary, and inform your readers that, whereas these settlers were out of the reservation, they are now in; while the fact is, whereas they were in, now they are out. Hangman's Creek is within the reservation, and if there are any white settlers on the part of that creek included in the proposed reservation I did not find them, although I was all over the valley; and if there should be any they are no worse off than before, for they were in the old reservation. As to Rock Creek, I do not know where it is, and therefore cannot speak of it only that we were assured both by the Indians and white settlers that the new reservation would not include any settlements not in before. And again, no new reservation was made, – only one defined as asked for by the Indians and a release drawn for all the Indian title to all the surrounding country, and the whole matter to be referred to Congress as the only power that can act in the matter; so that you see you have been entirely misinformed on the subject. Gen. Shanks and myself are both of the opinion that these Indians should be consolidated with the Spokanes and other tribes and put upon the Spokane Reservation, as that is large enough for all. We had no power to change the Indian policy of the Government, but to examine and report facts as we found there. We made no treaty, and had no power to make one.

While the Government treats the Indians as a high contracting party, and owning originally *all* the land, the

white settler certainly should not complain that arrangements are made whereby the Indian takes a *part* and cedes the balance to the Government for the use of the settler. Then, if those Indians should get a reservation of 750,000 acres, as you say, it will still be better than that they retain the ownership of all the millions of acres which they claim, and which claim the Government admits. You and I may differ with the Government in these questions of policy, yet when we are in the employ of the Government we must carry out the policy and instructions of the Government and not substitute that of our own. As for myself, I entertain views on these matters entirely at variance with the policy of the Government. I do not believe the Indian should be treated as a contracting party. I should make no treaties with him. I do not believe the Indian has any real *ownership* in the soil that should be recognized by a civilized Government. I believe the sooner the Government abandons all such ideas the better for the Government and for the Indian. I believe the true policy to be that the Government owns every foot of the public domain untrammelled by the imaginary titles of uncivilized Indians, and that in all dealings with Indians the Government should treat them as a guardian treats his wards, or as the father treats his children, and not as contracting equals. The Government should treat the Indian according to his *necessities* and *real interests*, and not according to his *desires* and *speculative interests*, – and the Government is surely the better judge of these necessities and interests. Under such a policy the Government could select proper reservations for all the Indians of the country without consulting them, and then force them to go upon them. Such reservations could be

few in number and so located as to concentrate the Indians of the country, and thus greatly lessen the cost of their protection and civilization and decrease the opportunities for fraud and robbery, while the whole country would be safe from danger. And as the child is better protected by the father than he can possibly do for himself, so would the Indians fare much better than now. Then, I think you will concede that the press could do more service to the country and less injustice to individual agents of the Government, by attacking the policy of the Government, than by reflections upon those who are honestly and faithfully endeavoring to carry out their instructions. Hoping that you will correct so much of your article as misleads the settlers of Northern Idaho, especially those on Pine Creek, I subscribe myself.

Yours truly,

T. W. BENNETT.

THE COEUR D'ALENE RESERVE.

To-day we publish Governor Bennett's letter in relation to the Coeur d'Alene Reserve. The Boise *Statesman* said it would give facts and figures relative to the boundary of this reserve which would set the SIGNAL right. We have carefully scanned the columns of the *Statesman* but have not yet seen them. Our informant in the first instance is a gentleman of undoubted veracity, and when Governor Bennett says we have been misinformed and are wrong in the premises we are nonplussed and know not what to reply. It was not our intention, however, to do an injustice to either Governor Bennett or General Shanks

when we made the statement, but simply to deprecate the policy of the government in its Indian affairs; and now, after having perused Mr. Bennett's personal views on Indian matters, we candidly admit that we will at all times accord him the credit of carrying out the instructions of the government, irrespective of all personal opinions. The Indian policy of the government is one of vital importance to the people of all the Territories, and with the views held by Governor Bennett as set forth in his letter, they will heartily accord.

EXHIBIT 234

FIRST SESSION, FORTY-THIRD CONGRESS.

EXECUTIVE DOCUMENTS
PRINTED BY ORDER OF
THE HOUSE OF REPRESENTATIVES.
1873-'74.

* * *

REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS
November 1, 1873.

I have the honor, in accordance with law, to forward herewith the annual report of Indian affairs of the country.

In respect to the general question of civilization of Indians, the record of the year is a good one. In many of the agencies gratifying progress has been made, as shown in increased interest in the education of children, a disposition to labor, the desire for allotment of lands, and in the increase of stock and ordinary farm products, and other personal property. At other agencies serious efforts in the same direction have developed more decidedly the difficulties which lie in the way of progress. Among these hinderances six are specially noticeable.

* * *

[Page 385]

* * *

COEUR D'ALENES.

The commission appointed to visit certain Bannock Indians, near Fort Hall, Idaho, were directed, under instructions from this office of the 1st of July last, to visit the Coeur d'Alene Indians, to hear complaints, with a view to their cure or removal, and to induce them to abandon a roving life and to consent to confine themselves to a reservation. They succeeded in having a council with these Indians, and as a result of their negotiations, the Indians agreed to go upon a reservation which was, at the time, described to them, and which has since been set apart temporarily by the President until legislation can be had thereon by Congress. For further particulars attention is invited to article entitled "Legislation recommended."

NORTHERN PACIFIC RAILROAD.

A commission was appointed on the 11th of March last to visit the roving Indians likely to oppose the construction of the Northern Pacific Railroad, through the valley of the Yellowstone, and instructed to open negotiations with them having in view the removal of all such opposition, and as far as possible obtaining the consent of said Indians to withdraw all further obstacles to its construction. The commission reported on the 9th of May that they had met nearly all the bands of Indians residing in the locality of the proposed route of said railroad, and

after submitting to them the object of their visit, felt assured that there would be no combined action on the part of the Indians against its further construction.

[Page 392]

* * *

AGREEMENT WITH COEUR D'ALENE INDIANS IN IDAHO.

In 1867 an Executive order was issued setting apart a reservation for the Coeur d'Alenes, but, being dissatisfied with the location, they never located thereon, and continued to roam over the tract of country claimed by them. For the purpose of extinguishing their claim to all the tract of country claimed by them, and of locating them on a reservation suitable to their wants as an agricultural people, an agreement has been made with them by Hon. J. P. C. Shanks, Gov. Bennett, of Idaho, and Agent J. B. Montieth, subject to ratification by Congress, which is respectfully recommended. Pending such action by that body, I have deemed it prudent to have set apart by executive order the tract of country described in said agreement as a reservation for said Indians, in order that white persons may be prohibited from settling thereon and claiming compensation for improvements from the Government.

* * *

EXHIBIT 275

Executive Orders

Relating to

Indian Reservations

From May 14, 1855

to July 1, 1912

[SEAL]

WASHINGTON

GOVERNMENT PRINTING OFFICE

1912

* * *

DEPARTMENT OF THE INTERIOR.

Washington, D.C., June 13, 1867.

SIR: I submit herewith the papers that accompanied the inclosed report of the Commissioner of Indian Affairs of the 23d ultimo, in relation to the propriety of selecting reservations in Idaho Territory upon which to locate the Coeur d'Alenes and other Indians in the northern part of Idaho, and the Boise and Bruneau Bands of Shoshones in the southern part of that Territory.

This department concurs in the recommendation of the Commissioner of Indian Affairs, that the lands indicated upon the annexed diagram, and defined in the accompanying report of the Commissioner of the General Land Office of the 6th instant, be set apart as reservations for the Indians referred to, and I have the honor to request, if it meets your approval, that you make the requisite order in the premises.

With great respect, your obedient servant.

W. T. OTTO, *Acting Secretary.*

THE PRESIDENT.

WASHINGTON, D. C., *June 14, 1867.*

Let the lands be set apart as reservations for the Indians within named, as recommended by the Acting Secretary of the Interior.

ANDREW JOHNSON.

EXECUTIVE MANSION, *November 8, 1873.*

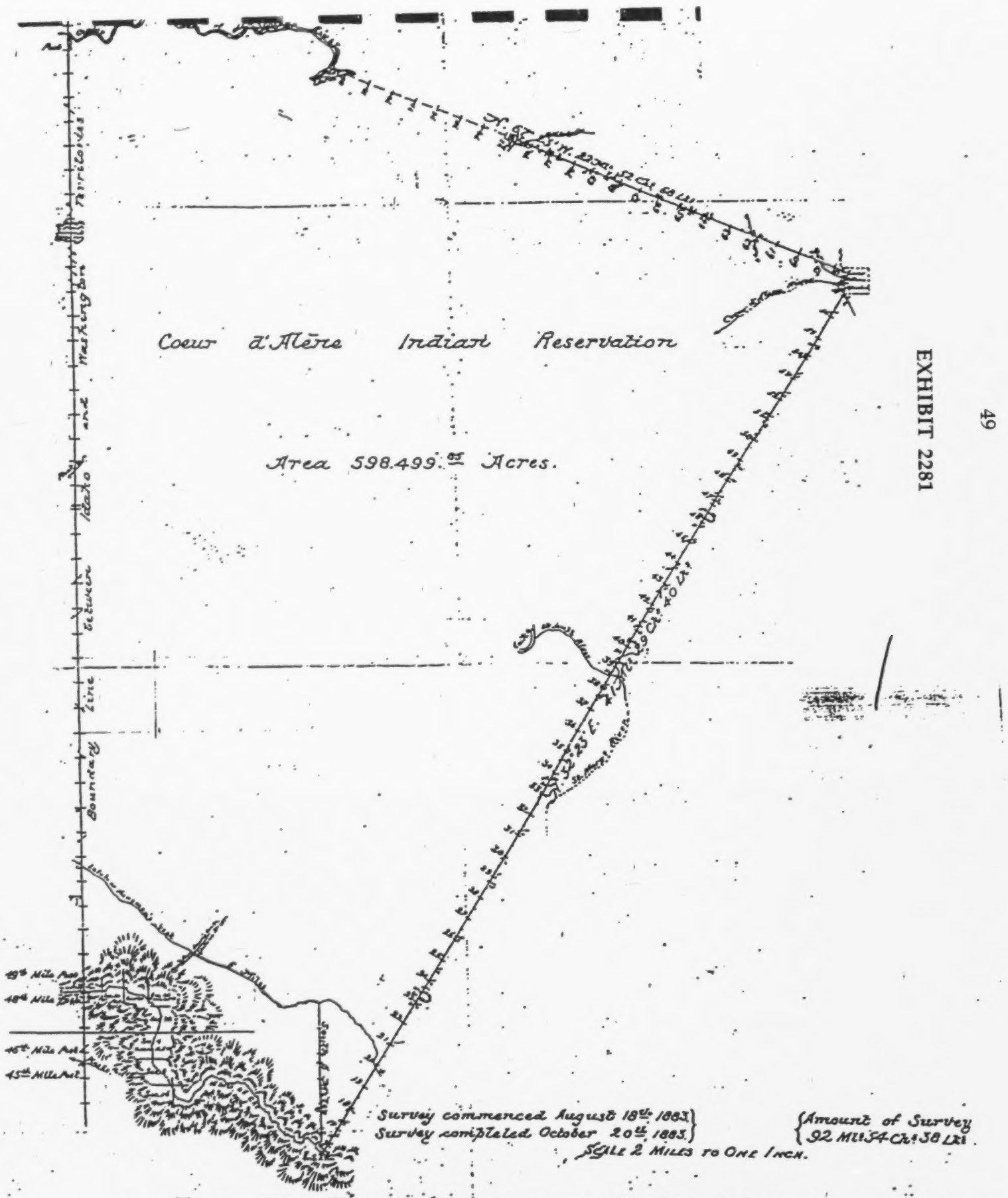
It is hereby ordered that the following tract of country in the Territory of Idaho be, and the same is hereby, withdrawn from sale and set apart as a reservation for the Coeur d'Alene Indians in said Territory, viz:

Beginning at a point on the top of the dividing ridge between Pine and Latah (or Hangmans) Creeks, directly south of a point on said last-named creek 6 miles above the point where the trail from Lewiston to Spokane Bridge crosses said creek: thence in a northeasterly direction in a direct line to the Coeur d'Alene Mission on the Coeur d'Alene River (but not to include the lands of said

mission): thence in a westerly direction in a direct line to the point where the Spokane River heads in or leaves the Coeur d'Alene Lakes; then down along the center of the channel of said Spokane River to the dividing line between the Territories of Idaho and Washington as established by the act of Congress organizing a Territorial government for the Territory of Idaho: thence south along said dividing line to the top of the dividing ridge between Pine, and Latah (or Hangmans) Creeks: thence along the top of the said ridge to the place of beginning.

U. S. GRANT.

EXHIBIT 2281



The above Map of so much of the out boundaries of the Coeur d'Alene Indian Reservation in Idaho as are not marked by prominent natural boundaries and by the surveyed line between Idaho and Washington Territories as surveyed by Darius F. Baker, U.S. Deputy Surveyor, under his contract No 96, dated April 5th 1883, is strictly conformable to the field notes of the survey thereof on file in this Office, which have been examined and approved.

U.S. Surveyor General's Office,
Boise City, Idaho Territory
May 15th 1884.

William P. Chenoweth
U.S. Surveyor General for Idaho

Department of the Interior
General Land Office
Washington, D.C. 1884

A true copy

Chief Clerk

EXHIBIT 649

Act of May 15, 1886
24 Stat 29, 44

CHAP. 333. – An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June thirtieth, eighteen hundred and eighty-seven and for other purposes.

. . . .

To enable the Secretary of the Interior to negotiate with the several tribes and bands of Chippewa Indians in the State of Minnesota for such modification of existing treaties with said Indians and such change of their reservation as may be deemed desirable by said Indians and the Secretary of the Interior, and as to what sum shall be a just and equitable liquidation of all claims which any of said tribes now have upon the Government; and also to enable said Secretary to negotiate with the various bands of tribes of Indians in Northern Montana and at Fort Berthold, in Dakota, for a reduction of their respective reservations, or for removal therefrom to other reservations; and also to enable said Secretary to negotiate with the Upper and Middle bands of Spokane Indians and Pend d'Oreilles Indians, in Washington and Idaho Territories, for their removal to the Colville, Jocko, or Coeur d'Alene reservations, with the consent of the Indians on said reservations; and also to enable said Secretary to negotiate with said Indians for the cession of their lands to the United States; and also to enable said Secretary to negotiate with the Coeur d'Alene Indians for the cession of their lands outside the limits of the present Coeur

d'Alene reservation to the United States, fifteen thousand dollars, or so much thereof as may be necessary, to be immediately available; but no agreement made shall take effect until ratified by Congress.

EXHIBIT 426

HEADQUARTERS DEPARTMENT OF THE COLUMBIA,
Office Acting Inspector General,
Vancouver Barracks, W. T., July 27th, 1886.

To the
Adjutant General, U. S. Army,
War Department, Washington, D. C.

Sir:–

I have the honor to report that, in obedience to the requirements of Special Orders No. 126, paragraph 4, from Headquarters Department of the Columbia, dated the 20th instant, I proceeded on the 21st to Fort Coeur d'Alene, Idaho, to investigate certain allegations embraced in letter to the Honorable Commissioner of Indian Affairs from R.E. McFarland, Esq., Register of the Land Office at Coeur d'Alene, Idaho, and referred to the War Department by the Honorable Secretary of the Interior, with reference to the sale of liquor upon the steamer "Coeur d'Alene", within the limits of the Coeur d'Alene Indian Reservation, Idaho.

In relation thereto I respectfully submit the following report, with inclosures. It is to be observed that, with the exceptions of a few indentations on its northern coast, the entire lake of Coeur d'Alene, and about twenty-five miles of the river of Coeur d'Alene – from the mouth up, as far as the landing on that river, known as the "Old Mission" – lay wholly within the Coeur d'Alene Indian Reservation.

The steamer "Coeur d'Alene" makes three round trips each week between the landing at the village of the same name, (which village adjoins the military reservation, one mile square, of the post of Fort Coeur d'Alene), down the lake: thence up the Coeur d'Alene river to the Old Mission – i. e. the entire course is within the limits of the Coeur d'Alene Indian reservation.

It makes, *en route*, the two regular landings of Rockford and Farmington. A wagon road from each of these landings leads to a small town situated without the Indian reservation, and of the same name as the landing. Miscellaneous freight and all classes of passengers, are taken on and put off at each of these landings. Besides these regular landings, the boat made, during my trip on her from Coeur d'Alene to the Old Mission and return, several other landings, putting off and taking on at each, individual passengers, with their luggage, and also fishing and excursionist parties, with their supplies.

From the time of leaving the town of Coeur d'Alene to the Old Mission, on the 23rd, and from the Old Mission to the first named place on my return trip, on the 24th, instant, an open bar was kept on the boat, at which drinks of various sorts of liquor, were very freely and frequently sold. As the boat touched the landings of Rockford and Farmington, the form was gone through with of pulling down the glass window in front of the bar for a moment, until the boat was again afloat, when the business of mixing and selling drinks was at once resumed and continued. I am reliably informed that even this lowering of the window at these landings is unusual, that the common custom is to leave it open and continue the sale of liquor.

It can be established that the free sale of liquor on board the "Coeur d'Alene", in the manner above detailed, has been carried on during her trips, for nearly a year. From [illegible] of three witnesses, whose statements I consider to be reliable, I am satisfied that liquor has been repeatedly sold by the glass on the boat, while she was tied up at 1 landing between Coeur d'Alene and the Old Mission, on the Indian reservation, and that it has also been sold on such occasions by the bottle, to be taken away and drank on the Indian reservation; that, as long as the boat was running last year, liquor was continually sold on it to miners and others while the boat was tied up at the old landing, which was within the Indian reservation, (near the Old Mission).

My information is reliable, that gambling and drinking, continued all night, is not an unfrequent occurrence on the boat at the present time, during her stay at or near the Old Mission landing. Indians employed on the boat as deck hands, have been seen on more than one occassion, under the influence of liquor, and a fair presumption is that the liquor was procured on board: and it is credibly stated that liquor has been sold repeatedly to half breed Indians.

The present landing on the Coeur d'Alene river is on ground rented from the Catholic Mission grant, and is not embraced within the limits of the Indian reservation: during a part of the year 1885, however, the landing there was within the limits of the reservation.

In short it is a fair statement to say that there exists to-day, and for a year past that there has existed, on the Coeur d'Alene steamer, a traveling bar-room for the retail

sale of liquor, accessable at all times on her trip, to all classes of whites.

As stated, it is comparatively recently that the steamer landing on the Coeur d'Alene river was [illegible] fully within the limits of the Indian reservation to the present landing, which is not within those limits.

Among the miscellaneous stores put ashore at the old landing, and on the Indian reservation, were large quantities of liquor. It will be seen, from the affidavit (marked "A") accompanying this report, of Mr. George McCabe, the former superintendent of freight on this line, that this liquor is not only landed on the Indian reservation, but that it was usually stored in the store-house of the Indian trader, Mr. James Monaghan, and concealed there for a long time, with his knowledge and consent.

Of the statutory violation by the owners of the steamer "Coeur d'Alene", in my judgment, it is fully susceptible of proof that Sec. 2139, R. S., is now, and has for more than a year past, been constantly transgressed, by the wilful introduction, storage, and sale of liquor within the limits of the Indian reservation; and in the furnishing, or the permitting to be furnished, of liquor to Indians, and to people of Indian blood: For these violations of law the boat should be libeled and seized, and proceedings instituted by the United States District Attorney, against the owners, for their unscrupulous conduct.

I am so well satisfied of such violation that, had my instructions not been limited to investigation only, I should have applied to the commanding officer of the

post of Coeur d'Alene, for the military seizure and detention of the steamer "Coeur d'Alene", for further procedure, as provided by Sec. 2140, R. S.

One of the present owners of the steamer "Coeur d'Alene" is I am credibly informed, Mr. James Monaghan, post trader at the military post of Fort Spokane, and authorized Indian trader of the Indian military reservation of Coeur d'Alene; another is Mr. C. B. Ming, post trader at the military post of Coeur d'Alene; another is Captain Samuel McKeever, of the 2nd H. S. Infantry; and another is Captain Abner Faines, of the 2nd Infantry.

Mr. Monaghan and Mr. King are co-partners in many enterprises in that section of the country, and each makes his position of trader a base of financial operations. Inasmuch as they have availed themselves of their government appointments to intentionally violate the law, I recommend that they both be at once removed from their places; and that the commanding officers of the military posts of Spokane and Coeur d'Alene, shall see to it, that neither of these men are permitted to have any further interest in traderships, in government contracts; or in other commerical transactions affecting the government; I also particularly invite attention of the Department to the fact that Mr. Monaghan is, I am informed, at the present moment, the authorized Indian trader on the Indian reservation, that such action may be taken as is deemed most advisable in his case.

Captain Samuel McKeever, of the 2nd Infantry, is at the present time the vice president of the steamboat company, and as stated, is, as I am informed, together with

Captain Malnos of the 2nd Infantry, an owner and manager. Inasmuch as Sec. 240, R.S., makes it the duty of every army officer to see that the laws governing the Indian country, are not violated, and, inasmuch as those officers appear to have been knowingly, actively conspiring in such violations that they be held accountable under the rules and articles of War for their conduct.

The mining enterprises in the Coeur d'Alene mountains have already, in the opening, and developing of mines and attendant interests, absorbed some hundreds of thousands of dollars capital. By reference to the topographical sketch inclosed, it will be seen that there is a route to the mines over the old Mullen road; and that there is another route from Thompson, Montana; so that the mining interests are not dependant upon the route across the lake through the Indian reservation, though no doubt such route is the most expeditious.

If steamers are allowed to continue to ply to and fro on the lake, they should be heavily bonded not to carry liquor or in any form, or under any circumstances; and managers and owners should be held responsible that passengers, and fishing and excursionist parties, transport no liquor across, or, to the shores of the lake.

Plainly, too, that the interests of the Indians may be fully protected, authorized landings should be designated, as well as the kind and extent of carriage and traffic; otherwise, with rapidly increasing commercial demands of the mines, the route is likely soon to become a highway for the public, as general and as unconditioned as any route in the country.

Already the Rockford and Farmington landings are becoming important points of supply in cattle and subsistence stores for the mines, and the traffic to these points, to and fro, from the towns of Farmington and Rockford, is very considerable. Of course, all this would be suspended, and the reservation be infinitely more secured to the Indians, if steamboat travel on the lake should cease.

Respectfully submitted,

(signed)

H.M. Lazelle
Lieut. Col. 2nd Infantry,
Acting Inspector General.

EXHIBIT 427T

(21307-1886)

War Department,
Washington City, August 9, 1886

Dear Mr. Secretary:

I beg to enclose the report of Lieut. Col. Lazelle's investigation of the charges made by Register R.E. McFarland with reference to the sale of liquor on the Steamer "Coeur D'Alene" within the Coeur D'Alene Military Reservation, and shall be glad to have this matter made special, so that I may confer with you on the subject at the cabinet meeting tomorrow.

Very truly yours,
Wm. C. Endicott,
Secretary of War.

Hon S.Z.C.Lamar
Secretary of War [Interior]
Enclo

EXHIBIT 3152

Department of Justice,
Washington,
October 9, 1886.

The Secretary of the Interior.

Sir:

Referring to your letters of July 30th, and August 21, 1886, with the enclosures, relative to the alleged sale of liquor upon the steamboat "Coeur d'Alene" within the Coeur D'Alene reservation in Idaho, I beg to transmit herewith for your information and consideration, copies of the reports by Special Agent John T. Wallace of this Department of the 26th and 27th ultimo.

Upon the receipt of your communications, the District Attorney for that Territory was furnished with copies of the correspondence submitted by you,and instructed to take cognizance without delay of that portion of the ex-parte matter which tended to establish a prima facie violation of Section 2139 Revised Statutes prohibiting the introduction of ardent spirits within the Indian country, and to take the proper steps to place the matter before the Grand Jury for investigation. Special Agent Wallace was also instructed to co-operate with the District Attorney and render him all assistance necessary. It appears from Mr. Wallace's reports that his efforts to stop the sale of whiskey by the steamboat company within the Coeur d'Alene reservation have been successful.

A copy of his letter of the 3rd instant,with a copy of one to him from the President of the Coeur d'Alene Navigation

Company giving the assurance that no further sale of liquors on its boats would be allowed,are herewith transmitted.

Very respectfully,
/s/ [Illegible]
Attorney General.

EXHIBIT 3139

HOUSE OF REPRESENTATIVES.

50TH CONGRESS. *1st Session.*

EX. DOC. No. 63.

REDUCTION OF INDIAN RESERVATIONS.

MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, TRANSMITTING

A communication from the Secretary of the Interior, with accompanying papers, relating to the reduction of Indian reservations.

JANUARY 9, 1888. – Referred to the Committee on Indian Affairs and ordered to be printed.

To the Senate and House of Representatives:

I transmit herewith a communication of 30th December, 1887, from the Secretary of the Interior, submitting, with accompanying papers, two additional reports from the Commission appointed to conduct negotiations with certain tribes and bands of Indians for reduction of reservations, etc., under the provisions of the act of May 15, 1886 (24 Stats., 44), providing therefor.

GROVER CLEVELAND.

EXECUTIVE MANSION,
January 9, 1888.

DEPARTMENT OF THE INTERIOR,
Washington, December 30, 1887.

The PRESIDENT:

Under the respective dates of January 11 and February 17, 1887, I had the honor to submit to you for transmittal to Congress two separate reports received by this Department through the Commissioner of Indian Affairs from the Commission commonly known as the Northwest Indian Commission, appointed under the provisions of the act of May 15, 1886, to negotiate with certain Indian tribes in Minnesota and the Northwest Territories (24 Stats., 44).

Those two reports, with their accompanying correspondence, which may be found in Senate Ex. Docs. No. 30 and No. 115, Forty-ninth Congress, second session, relate, the first to an agreement made with the Arickaree, Gros Ventre, and Mandan Indians residing upon the Fort Berthold Reservation in Dakota, and the other to two agreements made with certain of the Chippewa Indians in the State of Minnesota.

[2] I now have the honor to submit herewith two additional reports made by the said commission, with the accompanying letter of the Commissioner of Indian Affairs forwarding them to the Department, with five agreements made with various tribes and bands of Indians in the northwest, viz: The Gros Ventre, Piegan, Blood, Blackfeet, and River Crow Indians upon the reservation commonly known as the Great Blackfeet Reservation in northern Montana; the Upper and Middle bands

of Spokane Indians; the Coeur d'Alene Indians; the Pend d'Oreille or Calispel Indians; the Indians upon the Jocko Reservation in Montana.

The Commission report that they visited the Bois Forte and Grant Portage Reservations in Minnesota and held council with the bands thereon, but failed to secure their acceptance of or consent to the agreements made with the other Chippewas on September 7, 1886.

The five agreements now presented, together with the three heretofore reported, compete the work of negotiation so far as it could be accomplished by the Department with the tribes and bands of Indians for which provision was made in the act of May 15, 1886.

The Commissioner of Indian Affairs in his report, herewith, reviews at some length the provisions of each of the accompanying agreements, which may be briefly though very generally summarized, as follows:

The agreement with the Indians in northern Montana provides for the cession to the United States of over 17,500,000 acres of the large reservation now occupied by them, estimated to contain 21,651,000 acres, for a consideration of $4,500,000, to be expended for the benefit of the Indians in manner therein provided, in ten annual installments, so far as may be required; any excess above such requirements to be placed in the Treasury to their credit, etc. The unneeded portion of the reservation to be divided into three separate reservations, whose boundaries are given, for the Indians belonging to the three agencies located therein.

The Upper and Middle bands of Spokane Indians, in the agreement with them, relinquish to the United States any right, title, and claim which they now have or ever

had to any and all lands lying outside of the Indian reservations in Idaho and Washington Territories, and agree to remove to the Coeur d'Alene Reservation in Idaho, except such as prefer to go to the Jocko Reservation, in Montana, the consideration being $95,000, to be expended for their benefit in manner as specified in the agreement.

The Coeur d'Alene Indians, in the agreement made with them, relinquish to the United States, for the consideration of $150,000, to be expended for their benefit, etc., all right, title, and interest they now have or ever possessed to and in any lands outside the limits of their present reservation in the Territory of Idaho; they also agree to the removal to and settlement upon their reservation of the Upper and Middle bands of Spokane Indians, the Calispels (Pend d'Oreilles) now residing in the Calispel Valley, and to any other bands of non-reservation Indians belonging to the Colville Agency, Washington territory, etc.

The Pend d'Oreille or Calispel Indians, in agreement made with them, relinquish all right, title, and claim they have or ever had to lands in Idaho or Washington Territories or elsewhere, and agree to remove to and settle upon the Jocko (Flathead) Reservation, in Montana, except such as may prefer to go to the Colville Reservation, in Washington Territory, or to the Coeur d'Alene Reservation, in Idaho Territory; the consideration being the erection of saw and grist mill, building houses for Indians, clearing and breaking lands, etc.

The Indians on the Jocko (Flathead) Reservation, in the agreement with them, consent to the removal to and

settlement upon their reser [3] vation of the Upper and Middle Spokanes and Pend d'Oreilles; the consideration being the erection on the reservation for the Indians, by the United States, of a saw and grist mill, and providing a blacksmith and tools, etc.

The law under which these negotiations have been conducted provides that "no agreement shall take effect until ratified by Congress."

The Commissioner of Indian Affairs in his report herewith expresses the opinion that these agreements are just and favorable alike to the Government and to the Indians. He recommends their speedy ratification, and submits estimates of the various amounts required to be appropriated at this time by Congress to carry out the terms of the negotiations, which will be found on the concluding pages of his report.

By these negotiations a very large area of land now in state of reservation for Indian purposes, being the excess of quantity needed for the actual use of the tribes and bands for whom it has been held in reservation, is placed at the disposal of the United States so that it may be opened to settlement in such manner as Congress in its wisdom may direct; and further, the adjustment of claims asserted by Indians to large portions of land in Washington and Idaho Territories, now largely occupied by settlers, is provided for. When these negotiations shall have been fully ratified they will remove some serious hindrances to the contentment, the permanent settlement, and the more rapid advancement in civilization of the tribes and bands who are parties thereto. The money necessary to be appropriated for their support and to

assist them forward in the ways of civilization will not be, as heretofore, so largely a gratuity from the Government, but will go to them by judicious expenditures as consideration for valuable rights and claims which they have ceded and relinquished to the Government.

For these and other like reasons I concur in the recommendation of the Commissioner that the agreements be speedily ratified.

I have the honor to be, very respectfully, your obedient servant,

L.Q.O. LAMAR,
Secretary.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, December 13, 1887.

SIR: Referring to office reports, dated January 8 and February 11, 1887, respectively, transmitting two separate reports of the Northwest Indian Commission and accompanying agreements made with the Arickaree, Gros Ventre, and Mandan tribes of Indians occupying the Fort Berthold Reservation, in Dakota, and the Chippewa Indians in Minnesota, which reports, agreements, and accompanying papers form the subject-matter of Senate Ex. Docs. No. 30 and 115, respectively, Forty-ninth Congress, second session, I now have the honor to transmit herewith duplicate copies of two additional reports of said Commission and accompanying agreements (five in all) made with the several tribes in northern Montana, occupying the Gros Ventre, Piegan, Blood, Blackfeet, and Crow River Reservation, commonly known as the Great

Blackfeet Reservation, and the Upper and Middle bands of Spokane Indians, the Pend d'Oreilles, or Calispels, and the Coeur d'Alenes in Idaho, and the Flathead, Pend d'Oreille and Kootenai Indians of the Flathead Reservation in Montana. These reports are dated, respectively, February 11 and June 29, 1887.

[4] The authority under which these several agreements were negotiated is found in the Indian appropriation act, approved May 15, 1886 (24 Stats., p. 44), which reads as follows:

To enable the Secretary of the Interior to negotiate with the several tribes and bands of Chippewa Indians in the State of Minnesota for such modification of existing treaties with said Indians and such change of their reservations as may be deemed desirable by said Indians and the Secretary of the Interior, and as to what sum shall be a just and equitable liquidation of all claims which any of said tribes now have upon the Government; and also to enable said Secretary to negotiate with the various bands or tribes of Indians in northern Montana and at Fort Berthold, in Dakota, for a reduction of their respective reservations, or for removal therefrom to other reservations; and also to enable said Secretary to negotiate with the Upper and Middle bands of Spokane Indians and Pend d'Oreille Indians, in Washington and Idaho Territories, for their removal to the Colville, Jocko, or Coeur d'Alene Reservations, with the consent of the Indians on said reservations; and also to enable said Secretary to negotiate with the Coeur d'Alene Indians for the cession of their lands outside the limits of the present Coeur d'Alene Reservation to the United States, $15,000, or so much thereof as may be necessary, to be immediately available; but no agreement shall take effect until ratified by Congress.

* * *

[9] AGREEMENT WITH THE COEUR D'ALENE INDIANS.

These Indians also lay claim to a large tract of country in Washington, Idaho, and Montana Territories, by right of original occupancy, and as we have seen, the act authorized negotiations with them "for the cession of their lands outside the limits of the present Coeur d'Alene Reservation to the United States."

By the terms of the agreement made with them, the Indians cede and relinquish to the United States all right, title, and interest they now have or ever possessed in any lands outside the limits of their present reservation.

They also agree to the removal and settlement upon their reservation of the Upper and Middle bands of Spokane Indians, upon the terms and conditions agreed upon with said Spokane Indians, and also to the removal and settlement there of the Calispels (Pend d'Oreilles) now residing in the Calispel Valley, and any other band of non-reservation Indians belonging to the Colville Agency, upon terms agreed upon with any such bands.

In consideration of the foregoing, it was agreed that the Coeur d'Alene Reservation shall be forever held as Indian lands, for the home of the Coeur d'Alene and other bands settled there under said agreements, and that it shall never be sold or otherwise disposed of without their consent.

It is further agreed that the United States shall expend the sum of $150,000 for the benefit of the Coeur d'Alene Indians; $30,000 the first year and $8,000 per annum for fifteen years thereafter, in providing them with a steam saw and grist mill, in the employment of an

engineer and miller, and in the purchase of such useful articles as shall best promote their civilization, education, and comfort, and, under certain stipulated conditions, cash payments may be made to them. In addition to this, it is agreed that the United States shall employ, at its own expense, a competent physician, blacksmith, and carpenter, and supply medicines for said Coeur d'Alene Indians.

There are some other provisions intended to protect the morals and improve the conditions of said Indians, but the foregoing are the principal features of the agreement.

The Commissioners give an interesting account of the Coeur d'Alene Indians, and commend them in the highest terms for industry, thrift and sobriety. They speak of them as polite in a marked degree and exceedingly good-natured. They wear short hair, dress like the whites, and emulate them in everything save their vices. They live in comfortable houses, many of them having two – one on the farm and another in the village – cultivate the soil extensively, are loyal to the Government, respectful of the laws, devoted to their religion, and in short a better ordered or behaved community of Indians can nowhere be found. Such is the testimony of the Commissioners.

* * *

[10] In submitting these several agreements (5) for transmittal to Congress, I have the honor to make the following suggestions and recommendations:

In my annual report for the current year, in speaking of the work of this commission, I observed that it was not to be expected that any suggestions or recommendations of

the commission would be adopted by Congress which the existing severalty law might render unnecessary.

After carefully reviewing the reports of the commission and the several agreements submitted by them, I am free to say that in my judgment [11] the severalty act, so called, could not be substituted for the agreement made with the Indians in Northern Montana, nor the several agreements made with the Indians in Idaho and Washington Territories, with equal benefit to the Indians concerned, for the following reasons:

The Indians in northern Montana – on the Great Blackfeet Reservation – are not sufficiently advanced in civilization to take lands in severalty, and assume the obligations and responsibilities of citizenship which is conferred upon all those to whom individual allotments are made under said act.

Not only are they not prepared to take lands in severalty, but they do not desire to take that step at present; and the President has wisely ordered that allotments shall be made only on reservations where the Indians are known to be generally favorable to the experiment. Moreover, as shown in the beginning of this report, the country occupied by them is altogether unsuitable for that purpose. The Indians must be provided with stock for breeding purposes, and encouraged to raise cattle, sheep, and horses, not to the entire exclusion of farming, but as their chief industry and dependence. This they can do better, probably, at least for some time to come, by holding their lands in common. There is nothing, however, to prevent their taking grazing lands in severalty if at any time in the future it shall be deemed desirable to try the experiment with them.

Furthermore, if the agreement should fail of ratification, it is likely that these Indians will for a long time to come remain, as now, entirely dependent upon the bounty of the Government; and their vast possessions will continue to stand as a bar to the progress and development of the Territory which embraces them.

The agreements with the Upper and Middle bands of Spokane Indians and the Pend d'Orelle Indians provide for their removal and settlement upon the Coeur d'Alene and Jocko Reservations, and for the settlement of claims against the Government on account of bands taken from them in time past without compensation. The severalty act could not accomplish these much-desired objects, nor could it be substituted for other beneficent provisions found in said agreements with the Coeur d'Alene and Flathead (Jocko Reservation) Indians. The former provides for the settlement of a land claim similar to those of the Spokanes and Pend d'Oreilles; and also makes provision for the settlement of the Spokanes on the Coeur d'Alene Reservation, while the latter provides that the scattered Pend d'Oreille and other Indians may settle on the Jocko Reservation; objects greatly to be desired. From all that has been said, then, it will be seen that the several agreements must stand upon their own merits, irrespective of the severalty act, whose provisions it will be my endeavor to carry out wherever practicable.

To my mind the agreements are just and favorable alike to the Government and Indians. Millions of acres of land, equal to a great State, are made available to the white settler; long-standing and provoking claims against the Government are amicably adjusted; a very large number of Indians hitherto living in idleness, poverty,

and vice – a standing menace to the peace of the country – are to be gathered upon existing reservations, and assisted in the paths of civilization and toward their final self-support; and I think if faithfully carried out the future of these Indians will be extremely hopeful.

I therefore have the honor to recommend their speedy ratification.

* * *

[30] REPORT OF NORTHWEST INDIAN COMMISSION.

Washington, D. C., June 29, 1887.

Hon. J. D. C. ATKINS,

Commissioner of Indian Affairs, Washington, D. C.:

SIR: We hereby beg leave to submit a report of our proceedings with the Upper and Middle bands of Spokanes, Coeur d'Alenes, Lower bands of Pend d'Oreilles or Calispels, Confederated bands of Flatheads, Pend d'Oreilles, and Kootonais, Chippowas of Bois Forte, and Grand Portage Indians, residing in the Territories of Washington, Idaho, and Montana, and the State of Minnesota.

* * *

[32] The instructions which we received from the honorable Commissioner of Indian Affairs, of date July 27, 1886, who fully comprehended the condition of these Indians and the policy to be pursued toward them, were plain and unambiguous. We were told "that we were to visit the Upper and Middle bands of Spokane Indians, and negotiate with them for their removal to the Colville, Jocko, or Coeur d'Alene Reservations, with the consent of

the Indians of said reservations. They are scattered all over the country in the locations named, very many of them being in the neighborhood of Spokane Falls. Every proper inducement should be made to secure their settlement on one or the other of the reservations named. They claim to have been dispossessed of their land without compensation from any source."

* * *

[34] The Indians also agreed to remove to and settle upon the Coeur d'Alene Reservation in the territory of Idaho.

Article 2 provides that the Indians will be permitted to select their farms and homes on a tract of land to be laid off and surveyed, and the boundaries marked in a plain and substantial manner, under the direction of the Secretary of the Interior, on said Coeur d'Alene Reservation; and it further provides that said Indians will take lands under and according to the allotment bill, which became a law during the Forty-ninth Congress; the allotments so to be made as not to interfere with the Indians now on the Coeur d'Alene Reserve. It is agreed that these lands shall be the permanent homes of the Indians forever.

* * *

[35] COEUR D'ALENE

As soon as possible after concluding the agreement with the Upper and Middle lands of Spokanes, and settling the business incident to the council, we proceeded at once to the Coeur d'Alene Reservation in the Territory of Idaho.

We went from Spokanes Falls to Belmont, the terminus of the Spokane and Palouse Railroad, at which point we were met by parties with wagons who conveyed us to the town of Farmington, in Washington Territory.

On the next morning we proceeded to the Coeur d'Alene Reservation, 12 miles distant. The day was bright, and we had a fine opportunity of seeing the country, which is the finest in the West. We were informed whilst on our way that the chief, with an escort, would meet us and proceed with us to the De Smet Mission, where the council was to be [36] convened. The firing of a salute announced that the chief was near. We soon discovered the chief with about forty mounted men, armed with Winchester rifles, which they fired as the Commissioners approached. The chief dismounted, advanced in front, and welcomed the Commission to the reservation. The party then moved on, the soldiers marching on either side of the road. At the village the entire male population and many women and children had assembled. The chief, in a neat address, received the Commissioners, to which the chairman made reply, which was greeted with loud applause. The whole body of Indians then filed in front of the Commission, each one shaking hands with them and saying some kind of words.

The reservation is one of the best we have visited. The Indians have good productive farms, good houses, barns, gardens, horses, hogs, cattle, domestic fowls, wagons, agricultural implements of the latest pattern, and indeed everything usually found on flourishing farms. The Indians are industrious, thrifty, provident, and good traders. They wear their hair short, and dress in citizen's dress from head to foot. They are polite, good

natured, and ambitious to excel, and to do in all things as white men do, except to adopt their vices.

There may be a few exceptions, but so far as not to excite comment. Each one has a comfortable house on his farm, and nearly all have equally comfortable houses at the Mission, which together make quite a village. They remain on their farms during the week days, and on the Sabbath they repair to their dwellings at the village to attend religious services and see their children, who are at the Mission schools. Their land outside of the reservation, and much of it the best in that country, has been appropriated by the whites, and the Indians have never received a dollar.

They have been the friends of the white people in times of great trouble, and many owe their lives and property to the protection afforded them by these Indians against hostile tribes. As we were not to meet them in council, as they requested, until the next morning after our arrival, we were invited to visit their schools, which we did. Both school-houses are large, well constructed, and stylish in appearance. Inside they are neat, clean, and in every way suitable for schools. On entering the school room the boys arose and stood until we were seated. Paul Polatkin, a full-blood Indian boy of twelve years, stepped to the front and in a clear and distinct voice said:

> "Honored Sirs: It is with feelings of great pleasure that I, in the name of my fellow-classmates, extend to you a cordial welcome to our school. We first thought that we would not have the pleasure of seeing you here, as it was rumored that you would call the chiefs to

> Spokane Falls, and there transact whatever business you had with them. We are glad you decided otherwise. It will give you a chance to see how our people live and support themselves.
>
> "You will see at a glance that they 'earn their bread by the sweat of their brow,' as the land around here testifies. You will also see that here at school we are by no means idle, but try every day to add another grain of knowledge to our store. Hoping our exercises will please you, we welcome you to our school."

The exercises were of the most interesting and satisfactory character. The proficiency shown by these Indian children was as great as that of any school anywhere ever visited by the Commission.

At the close of the exercises Judge Wright thanked the boys for the cordial welcome they had given the Commissioners. He said he was delighted with their country. It was not only a beautiful country, but what was better, he saw that it was appreciated. He saw houses, farms, and other evidences of prosperity, which surprised him. His pleasure was greatly increased at seeing that Indian boys were the equals of the white boys in capacity to receive an education. He assured them that they had nothing to fear or to be ashamed of, and that if they continued in the path in which they were now walking they would reach a point where they would stand on equal ground with their white brethren, deserve and receive all the rights of American citizenship, and have opened to them all the avenues of fortune, fame, and happiness accorded the most favored people. In conclusion, he assured them that the Commissioners would do

all in their power to protect the rights, advance the interests, and promote the prosperity of the Coeur d'Alene.

The girls' school was then visited, and what has been said of the boys' school is equally applicable to this. On entering the school-room we were greeted with a song of welcome by the children and the music of the organ.

The voice of the Indian woman in singing is peculiarly beautiful and touching. There is a tone of gladness mingled with melancholy which is indescribable and can only be felt. This may be accounted for on the theory that traditional accounts of the sufferings of the race and the centuries of wrongs endured have made so deep an impression that even the dawn of a better and brighter day can not entirely obliterate. Every sensitive heart must have been touched to the core when they all sung together, "Will we [37] know each other there." When the singing ceased Mary Josette, aged twelve, a full-blood Coeur d'Alene, delivered this address:

> "Respected Sirs: Allow me in the name of my dear little companions to offer you our glad greeting and to bid you a fond welcome to our happy convent home to-day. True, we are but simple little children of the forest, yet our young, untutored hearts have learned to love and revere the kind friends of our parents and tribe, and we trust that you too have come animated by that same worthy zeal which has distinguished so many of your predecessors – the future welfare of the Indians.
>
> "Deeming that such is your motive, please accept our thanks for the deep interest you have manifested in our regard, and may God bless you and reward you an hundredfold for your

noble and generous deeds and grant you a pleasant and prosperous journey to your far-distant homes."

One by one the classes were called and exercises given in spelling, reading, writing, geography, history, and arithmetic. Notwithstanding the native modesty and timidity of Indian girls in the presence of white strangers, they stood the test beyond any anticipation. They were not only ready in answers, but it was apparent to all that they thoroughly understood what they were doing and saying. Some of them solved with apparent ease problems in arithmetic which would give trouble to many graduates of Eastern female schools.

At the conclusion of the address Judge Wright said that the Commissioners had visited the boys' school and were delighted with the progress there shown, but he believed that the girls, if possible, excelled the boys. He did not know whether to attribute this expression of opinion to the fact of his gallantry. He believed, however, that it was concealed that the girls advanced more rapidly at school than boys; certain he was that he had never seen a school in his own section of the country which for good order and proficiency in study excelled this one. Any American having a daughter at school showing such proficiency in study as you have shown might well feel proud of her. He said, I see that you are not all Indians; some of you are half, and a few the children of white parents. It is indeed a pleasing sight to witness the children of the white and red races mingling together in the same school – all marching in the same path, with the same hopes, the same aspirations, the same flag of red, white, and blue, the same country, and all striving to

reach the same blue heaven above. You should be thankful to the great Creator, the Father of us all, that he has sent to you in this wilderness the holy Fathers, Mothers, and Sisters to lead you in the paths of virtue and happiness.

Some of you missed a word or two in spelling. Do not allow that to discourage you, for there were some words given you to spell that would have puzzled either one of the Commissioners. And, besides, I think you knew how to spell them, and failed because of the natural timidity and modesty which is the glory of your sex. I had rather see a girl misspell an hundred words through modest embarrassment than see her spell a whole dictionary of words correctly, she lacking in that quality which so highly adorns woman and which renders her the object of our love and admiration.

In one of the selections read to us it is said "there are nights without a star and no days without a cloud." There have been times in the past when the Indian nights were without stars, and when the whole heavens above were dark with black and threatening clouds, but I feel glad to be able to say to you that it will be so no more. On this reservation the Indian problem will be solved at last. Here it is demonstrated that the Indians can work, and are willing to work and make a living for themselves, their wives, and their children, and that Indian children can stand side by side with the children of the Anglo-Saxons and compete with them in the race for knowledge and learning. The stars are beginning to appear in your heaven and the clouds are rolling by; even now the silver lining appears, and the glorious light of reason, science,

and religion will ere long include your race in its broad scope and shed its benign rays on your humble homes.

At the appointed hour the Indians met us on the following morning; nearly the whole male adult population were present. On the appearance of the Commissioners every Indian arose and stood uncovered until the Commissioners were seated.

Father Carnano was requested to open the deliberations with prayer.

The father stepped forward and every Indian dropped on his knees. A short and fervent prayer was offered, to which the Indians responded.

Judge Wright then addressed the Indians, fully informing them of the object of the visit. He gave them a vivid picture of the unhappy condition of their brethren the Spokanes, explaining to them the nature and terms of the agreement which the Spokane Indians had entered into to remove to the Coeur d'Alene Reservation. He also explained to them that their reservation was greatly desired by others, and how important it was that it should be occupied by Indians, and asked them to give their consent that the Spokanes and other scattered tribes should come on their reservation. He also spoke of the loss of their lands and its occupation by the white men; asked them [38] to speak out freely on all these and any other questions of interest which might suggest itself to their minds.

Dr. Daniels addressed them. He said he had been engaged in transacting business with the Indians for many years. He assured them of the good wishes of the

Government, and stated that the Commissioners would endeavor in an earnest way to advance their interests and make them prosperous and contented.

Chief Seltice arose and stated that what had been said made his heart glad; that he had waited anxiously for the coming of the Commissioners; that his people would listen attentively to any propositions which the Commissioners might be pleased to make and give them careful consideration; that his people would meet at night and talk together, and meet us again the next morning.

Judge Wright informed them that an agreement had been prepared, which would be read article by article, and fully interpreted and explained to them.

Before this was done Commissioner Andrews addressed the Indians in plain and earnest language, commending them for their industrious habits and friendly feeling toward the whites. He said he was surprised as well as delighted at the progress they were making, and predicted a bright and glorious future for them. At the conclusion of Commissioner Andrew's speech the Indians manifested their approval by their peculiar shout and clapping of hands. Chief Seltice in a few well-chosen words thanked, in the name of his people, the Commissioner for his words of encouragement and advice.

The agreement was then read to them by Commissioner Andrews, and each section carefully interpreted, to which the Indians gave marked evidence of approval.

Chief Seltice and his people manifested great concern about the future of their reservation. The clamor of the

whites for the opening of the reservation had reached their ears and made their hearts heavy. The fact that all their land since this reservation had been taken from them without even the pretense of the asking, and the rapid increase of white settlers around them were calculated to arouse their fears. They had no treaty relations with the Government and had no assurances of its fostering care. The visit of the Commission, and more especially when it was known that its visit was of the most friendly character, filled their hearts with gratitude and hope, which were manifested in their faces, their tone, and their expressions.

When assurances were given them that they would be protected by the Government in their homes and reservation their gratitude knew no bounds, and it is the sincere belief of the Commissioners that Chief Saltice and every able-bodied man of his tribe could be relied on in any emergency in the defense of the flag and the country with as much certainty as any community in the Union. This is strong language, but it is true. Whilst we cannot speak so confidently of the other tribes and bands visited by the Commissioners, we express the confident opinion that our visit and negotiations with other tribes have greatly strengthened their respect for and confidence in the Government.

On the next day the agreement was again read over and explained, when the chief who had been empowered to speak for the tribe announced that he and his people were ready to sign the agreement. Every man in the council followed, and over two-thirds of the male adults signed the agreement, and it was apparent that all would have done so had they been present.

The agreement was concluded at DeSmet Mission, March 26, 1887. By its terms, for a consideration, the Indians cede, grant, relinquish, and quitclaim to the United States all right, title, and claim which they now have or ever had to all lands except that included within the boundaries of the present Coeur d'Alene Reservation.

The lands which they claimed, and held by occupancy, contained about 4,000,000 acres. They had the same title to it which other Indians had, that is, the fee in the United States, and the occupancy, with all its incidental rights, in the Indian. The right of the Indians to their occupancy is as sacred as that of the United States to the fee.

They had been despoiled of this right without compensation from any source. Our instructions clearly contemplate a settlement of the claim based on the loss of these lands, and we were referred to Senate Ex. Doc. No. 122, Forty-ninth Congress, first session, which we examined with great care and attention.

On page 9 of this document will be found the petition of the Coeur d'Alene Indians, addressed to the President of the United States, setting forth their claim and the boundaries of the land in question. This country, as the petition alleges, "is one of the most valuable in Washington Territory, dotted by numerous and valuable wheat farms, valuable forests of timber, saw-mills, gold, silver, and lead mines, the military post at Coeur d'Alene, and numerous thriving towns and villages. The Northern Pacific Railroad runs directly through it, and much of the land owned by that corporation was the land of these Indians.

The history of the failure of Governor Isaac J. Stevens in 1855 to meet and negotiate with these Indians is well known to the country.

[39] At De Smit Mission we were furnished with the original agreement made and concluded on the 28th day of July, 1873, at Latah or Hangman Creek, in the Territory of Idaho, by and between John P. C. Shanks, John B. Monterth, and T. W. Bennett, special commissioners on the part of the Government of the United States, and the chiefs and headmen of the tribe of Coeur d'Alene Indians.

We had a copy of said agreement prepared and herewith submit the same as part of this report.

Reference is made to this paper and also to the fact that these Indians were recognized by the Government in 1855, as being entitled to consideration when Governor Stevens was constituted a commissioner to deal with certain northwestern tribes in order to show that their claim to compensation had been heretofore entertained. By reference to the copy of the agreement, it will be observed provision was made for a reservation for the Coeur d'Alenes out of a portion of these lands, and the tribe relinquished to the Government *all lands heretofore claimed by them lying and being outside of said described reservation*. The boundaries are then given in detail, and it will be found that they substantially agree with the boundaries given in the petition of the Indians.

As a consideration for the above cession it was agreed that they should be paid for improvements made on the lands lying in Washington Territory in case by survey of the line they were found to be in that Territory.

In addition, the Government agreed to furnish the Indians with 10 wagons, (2-horse), 10 sets of harness, 5 sets plow harness, 60 plows, 10 pair American mares, 10 whip-saws, 10 cross-cutsaws, 2 mowers, 2 mowers and reapers combined, 1 set blacksmith's tools, 2 one-horse rakes, 20 harrows, 10 grain cradles, to construct one saw and grist mill, to build a school-house with apartments for males and females, one boarding and lodging house, one smith's shop, and in addition to all this the United States agreed to fund in United States 4 per cent bonds the sum of $170,000, interest to be paid annually for the benefit of the Indians, with right on the part of the United States of paying the principal at any time after 20 days.

This agreement was formally signed by three commissioners and witnessed by R. B. Whitman and T. M. Cataldo, S. J., and by all the chiefs and headmen of the Coeur d'Alene tribe.

At the time we had no means of ascertaining whether this agreement was submitted to Congress for its ratification, as was provided for therein. It was of service, however, in aiding us to what amount of compensation should be given as consideration for the lost lands. The amount necessary to fulfill the stipulations of this unratified agreement is larger than that which your Commission agreed to give in this one.

The third article of our agreement gives the consent of the Coeur d'Alenes to the removal to their reservation of the Spokane Indians, in accordance with the terms provided in the agreement with the Spokanes and the fourth article, that the Calispels and any other non-reservation Indians may also be removed to that reservation.

The anxiety of the Indians about their reservation and their fears that it might in some way be taken away from them, their unexampled good conduct, their friendship for the neighboring whites, displayed on a late memorable occasion, their rapid advancement in self-support and civilization unaided by the Government, their willingness to allow their reservation to be filled up with Indians, the confidence they repose in the Government to settle their claim on its own terms, all conspired to cause us to put in the fifth clause, which provides that their reservation shall be held forever as Indian land as homes for the Coeur d'Alenes and such other Indians as may be removed thereto, and that no part of the reservation shall ever be sold or occupied, open to white settlement, or otherwise disposed of without the consent of the Indians.

It may be said that this was unnecessary, inasmuch as no such thing would happen; but the loss of their former possessions and other causes had so excited their fears that it was concluded, in order to allay suspicion, and in as strong a manner as possible, bind the Government to that good faith which the Indian prizes so highly and which he thinks has been violated so frequently.

Article 6 provides that the sum of $150,000 shall be expended under the direction of the Secretary of the Interior, as follows:

For the first year, $30,000; and for each succeeding year for fifteen years, $8,000.

These Indians had everything which they needed or wanted, or if not it was within their power to procure it,

except a saw and grist mill. It was agreed that the construction of this should be the first item of the expenditure, the cost of this to come out of the $30,000, together with the pay of the engineer and miller. For the probable cost of the mill we beg leave to refer to our report as to the Spokane Indians. The balance of the money provided for is to be expended in such useful and necessary articles as shall best promote the progress, civilization, comfort, improvement, and education of the Coeur d'Alenes.

Article 7 deserves some comment and explanation. When it was ascertained that these Indians really needed and desired nothing in the way of clothing, food, agricultural imple[40]ments, or school facilities it became a question with the Commission as to the method proper to be pursued in the payment of the amount in satisfaction of the claim. From information derived from the best and most reliable sources we learned that the police regulations were of the highest order, which results in excluding ardent spirits from the reservations; and that long experience in self-reliance and traffic with the neighboring whites had made them cautious, shrewd, and provident in the use of money. We learned that their trade in one town adjacent to the reservation amounted to about $25,000 yearly. We therefore conclude that justice requires us to recognized these qualities and facts and adapt our course to the advanced condition of the Indians. Hence it is provided in this article 7 that if it shall appear to the satisfaction of the Secretary of the Interior that in case the Indians need none of the money expended as provided in article 8, they being already provided with such things, and further, that they will judiciously use the money, the same may be paid to them in cash pro rata. It will cost the

Government no more to pay in cash than in supplies, and, besides, the trouble will be much diminished.

All money not expended in any one year, according to the provisions of the agreement, is to be kept for the use of the tribe, and that the wishes and needs of the Indians are to be consulted when purchases are made for them.

In the employment of engineers, millers, mechanics, and laborers of every kind preference is to be given to Indians qualified to perform the work, and all persons employed are required to teach the Indians these trades and vocations. We were assured that in a short time Indians on the reservation would be fully qualified to do all these things, and we considered this an important provision, tending to their rapid self-support.

It was further agreed that the United States would furnish a competent physician and medicines, a blacksmith, and a carpenter.

Article 12 makes provision as to marriages between Indian women and white men similar to that made by the commission with the Chippewas of Minnesota.

This provision and the one allowing certain white men, four in number, who have married Indian women and who are now residing on the reservation, was embodied in the agreement at the special instance and request of the tribe.

As to article 13, it is proper to state that this was also embodied at the earnest request of the entire tribe.

The fathers who went among these Indians at an early day found them a fierce, wild, and ignorant people

in their aboriginal state, and have, by patience, toil, and care brought them to their present advanced state of Christianity and civilization. A better ordered and better behaved Indian community can nowhere be found. They are active, industrious, thrifty, and self-supporting. Their respect for the law, their loyalty to the country, and devotion to religious principles and practices are greatly to be commended. All this they attribute to the work of the fathers, who have expended in building of churches, school-houses, and other buildings, opening and fencing farms, not less than $20,000. On these farms the Indians have learned the art and science of agriculture. Both schools, male and female, are filled with Indian children walking in the same path, not only receiving good educations but learning all the practical duties of life.

As has been stated before, the chief matters of concern which occupied their minds was the preservation of their homes and the perpetuation of their church and school facilities.

It appeared that they had years ago given their consent to the provision contained in this article, and wishing it embraced in a more lasting and durable form they requested the insertion of that part of the agreement.

With all the facts before the Commission, and being on the ground, we deemed it of the highest importance to the Indians and their posterity that this arrangement should be made. It will be seen that the title in fee is not touched, and that the right of use is all that is conceded, or in other words, to use the expressive language of the Indians, they simply "lend the land" in order to secure the education and civilization of their children.

After concluding our labors with the Coeur d'Alenes we returned to Spokane Falls in order to arrange for a visit to the Calispels or Lower Pend d'Oreilles.

* * *

[53] *Agreement with Coeur d'Alene.*

This agreement made pursuant to an item in the act of Congress entitled "An act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the year ending June 30, 1887, and for other purposes, "approved May 15, 1886, by John V. Wright, Jarred [54] W. Daniels, and Henry W. Andrews, duly appointed Commissioners on the part of the United States, and the Coeur d'Alene tribe of Indians, now residing on the Coeur d'Alene Reservation, in the Territory of Idaho, by their chiefs, head-men, and other male adults, whose names are hereunto subscribed, they being duly authorized to act in the premises, witnesseth:

ARTICLE 1.

Whereas said Coeur d'Alene Indians were formerly possessed of a large and valuable tract of land lying in the Territories of Washington, Idaho, and Montana, and whereas said Indians have never ceded the same to the United States, but the same, with the exception of the present Coeur d'Alene Reservation, is held by the United States and settlers and owners deriving title from the United States, and whereas said Indians have received no compensation for said land from the United States: Therefore,

ARTICLE 2.

For the consideration hereinafter stated the said Coeur d'Alene Indians hereby cede, grant, relinquish, and quitclaim to the United States all right, title, and claim which they now have, or ever had, to all lands in said Territories and elsewhere, except the portion of land within the boundaries of their present reservation in the Territory of Idaho, known as the Coeur d'Alene Reservation.

ARTICLE 3.

The said Coeur d'Alene Indians agree and consent that the Upper and Middle bands of Spokane Indians reside in and around Spokane Falls, in the Territory of Washington, may be removed to the Coeur d'Alene Reservation and settled thereon in permanent homes on the terms and conditions contained in an agreement made and entered into by and between John V. Wright, Jarred W. Daniels, and Henry W. Andrews, commissioners on the part of the United States and said Spokane Indians, concluded on the 15th day of March, 1887, at the Spokane Falls, in the Territory of Washington.

ARTICLE 4.

And it is further agreed that the tribe or band of Indians known as Calispels, now residing in the Calispels Valley, Washington Territory, and any other land of non-reservation Indians now belonging to the Colville Indian Agency, may be removed to the Coeur d'Alene Reservation by the United States, on such terms as may be

mutually agreed on by the United States and any such tribes or lands.

ARTICLE 5.

In consideration of the foregoing cession and agreements, it is agreed that the Coeur d'Alene Reservation shall be held forever as Indian land and as homes for the Coeur d'Alene Indians, now residing on said reservation, and the Spokane or other Indians who may be removed to said reservation under this agreement, and their posterity; and no part of said reservation shall ever be sold, occupied, open to white settlement, or otherwise disposed of without the consent of the Indians residing on said reservation.

ARTICLE 6.

And it is further agreed that the United States will expend for the benefit of said Coeur d'Alene Indians the sum of one hundred and fifty thousand dollars, to be expended under the direction of the Secretary of the Interior, as follows: For the first year, thirty thousand dollars, and for each succeeding year for fifteen years, eight thousand dollars. As soon as possible after the ratification of this agreement by Congress, there shall be erected on said reservation a saw and grist mill, to be operated by steam, and an engineer and miller employed, the expenses of building said mill and paying the engineer and miller to be paid out of the funds herein provided. The remaining portion of said thirty thousand dollars, if any, and the other annual payments shall be expended in the purchase of such useful and necessary

articles as shall best promote the progress, comfort, improvement, education, and civilization of said Coeur d'Alene Indians, parties hereto.

ARTICLE 7.

It is further agreed that if it shall appear to the satisfaction of the Secretary of the Interior that in any year in which payments are to be made as herein provided said [55] Coeur d'Alene Indians are supplied with such useful and necessary articles and do not need the same, and that they will judiciously use the money, then said payment shall be made to them in cash.

ARTICLE 8.

It is further agreed that any money which shall not be used in the purchase of such necessary articles or paid over, as provided in article 7, shall be placed in the Treasury of the United States to the credit of the said Coeur d'Alene Indians, parties hereto, and expended for their benefit, or paid over to them, as provided in the foregoing articles.

ARTICLE 9.

It is further agreed that in the purchase for distribution of said articles for the benefit of said Indians the wishes of said Indians shall be consulted as to what useful articles they may need, or whether they need any at all, and their wishes shall govern as far as is just and proper.

ARTICLE 10.

It is further agreed that in the employment of engineers, millers, mechanics, and laborers of every kind, preference shall be given in all cases to Indians, parties hereto, qualified to perform the work and labor, and it shall be the duty of all millers, engineers, and mechanics to teach all Indians placed under their charge their trades and vocations.

ARTICLE 11.

It is further agreed that in addition to the amount heretofore provided for the benefit of said Coeur d'Alene Indians the United States, at its own expense, will furnish and employ for the benefit of said Indians on said reservation a competent physician, medicines, a blacksmith, and carpenter.

ARTICLE 12.

In order to protect the morals and property of the Indians, parties hereto, no female of the Coeur d'Alene tribe shall be allowed to marry any white man unless, before said marriage is solemnized, said white man shall give such evidence of his character for morality and industry and shall satisfy the agent in charge, the minister in charge, and the chief of the tribe that he is a fit person to reside among the Indians; and it is further agreed that Stephen E. Liberty, Joseph Peavy, Patrick Nixon, and Julien Bontellier, white men who have married Indian women and with their families reside on the Coeur d'Alene Reservation, are permitted to remain

thereon, they being subject, however, to all laws, rules, and regulations of the Commissioner of Indian Affairs applicable to Indian reservations.

ARTICLE 13.

It is further agreed and understood that in consideration of the amount expended in buildings and other improvements on said Coeur d'Alene Reservation for religious and educational purposes by the De Smet Mission, and valuable services in the education and moral training of children on said reservation, and in consideration that the Indians, parties hereto, have donated for said purposes one section of land on which is situated the boys' school, one section on which is situated the girls' school, and one section of timbered land for the use of the schools, that said De Smet Mission and its successors may continue to hold and use said three sections of land and the buildings and improvements thereon so long as the same shall be used by said De Smet Mission and its successors for religious and educational purposes.

ARTICLE 14.

This agreement shall not be binding on either party until ratified by Congress.

In testimony whereof the said John V. Wright, Jarred W. Daniels, and Henry W. Andrews, on the part of the United States, and the chiefs, headmen, and other adult Indians, on the part of the Indians, parties hereto, have hereunto set their hands and affixed their seals.

[56] Done at De Smet Mission, on the Coeur d'Alene Reservation, in the Territory of Idaho, on this the twenty-sixth day of March, in the year of our Lord one thousand eight hundred and eighty seven.

JOHN V. WRIGHT. [SEAL.]
JARRED W. DANIELS. [SEAL.]
HENRY W. ANDREWS. [SEAL.]

Signed with an x mark and seal:

Chief Andrew Lettice, Regis, Pierre Welsholque, Edward, Damas, Vincent, Paul Reni, Charles Louis, Elimo Spokane Wenceslas, Pierre Chiapa, Pierre Hartholomewie, Bernard Speqmilks, Louis Sguchau, Encas Chthei, Timothy Polotkanh, Alexis, Adrian Umas, Sebastian, Camille, Enens Nchiesu, Luke Nugani, Hilarous, Basil Kasitquizuit, Josuhua, Fidcle, Prosper Ntimilps, Alphonse, Paul Tchkanize, Pierre Joseph, Daniel, Enes Temulian, Louis Stanislaus-Harmahy, Etienno Niukols, Frisby Nisclmnkomistauegalim, Tibuce Silosket, Anthony Seme, Charles Augustus, Leo Achetops, Etienne Stakamski, Leo Kuimchilsile, Thomas Guissnage, Cornelius Quiquilel, Louis Schumukuimo, Adrian Milmilagan, Alexander Chilcheko, Adrian Schizikue, Pierre Joseph Schezi, Hemo Chimineme, Joseph Karlimkue, Louis Michael Weigolehin, Michel, Pierre Joseph Schaike, Benoit Schulilize, Louis Sebastian Kutilkuku, Adrian Kuzalchan, Joseph Nkonoqua, Isadore Npapskue, Charles Polatkin, Aenead Basil, Andrew Ologazu, Moses Mogzela, Pierre Paul Koipe, Beniot Schilzispo, Louis Mulkapsie, Daniel Quinemose, Les Nzakakalipengn, Aeneas Paul Mguiakan, Louis Lolo, Francois Nsispikua Nkaisis, Francois, Eugene, Felicien, Pierre Basil Lauwasket, Leo Templilime, Louis Minuse, Louis Lotone, Stanislaus,

Nichodemus Kruto, Louis Sepas, Paynse Willimseme, Louis Scisquoachau, Phillip Pokatchau, Joseph, Peter Paul, Stephen.

BENJAMIN S. MOORE,
Agent

Witnesses:

SYDNEY D. WATERS.
JOHN P. SWENEY.

I, Robert Felt, U. S. Indian Interpreter for the Colville Indian Agency, W. T., do hereby certify on honor that the foregoing agreement was carefully read and fully explained to the Indians in open council and by me correctly interpreted, and that the contents thereof was fully understood by said Indians before the signing and sealing of the same.

his
ROBERT + FELT.
mark

Witness:

A. C. KING.

Dated DE SMET MISSION, COEUR D'ALENE RESERVATION,
IDAHO TERR'Y, *March* 26, 1887.

* * *

[60] COUNCIL WITH COEUR D'ALENES.

WEDNESDAY, *March* 23, 1887.

The council met and opened with prayer by Reverend Father Carnano. Present, Commissioners Wright, Daniels, and Andrews, the chiefs and bands of the Coeur d'Alenes, and the Interpreter. Judge Wright said:

"My friends, we have traveled a great distance in order to meet you. We thank you most sincerely for the very kind reception you have given us, and for your words of friendly greeting. You are the descendants and representatives of a noble tribe of Indians. You have given up the pursuit of war and of the chase and are devoting all you energies to the arts of peace; you are striving manfully to take care of yourselves, your wives, and your children. We have visited your schools and have seen how well your children are being educated. All this we need not tell you. We are well pleased, and particularly when we know that you feel so deep an interest in these matters. It will inspire your friends to renewed efforts. It will strengthen those who are striving to advance you and place you firmly on the road to civilization and independence. Those who sent us here will be glad to hear all this. Your condition and the character of your reservation we had heard of before our coming, but it is better than had been told us. You are known to be a people who are rising in intelligence and in all the pursuits of peace; that you have been friendly toward your white neighbors, and that you have given them assistance in times of danger and trouble, is known and appreciated. It is also known that you claim to have once possessed a large body of land, that much of it has been settled by white people, that you had never ceded it away, and that you have received nothing for it. You have a good reservation which you wish to preserve for yourselves and your children. The Great Father desires that this shall be done. You have good farms, fences, and houses, agricultural implements and stock, and we learn that you are working men, that you cultivate your farms and make good crops. We come with kind words from the Great Father. We do not come to force you to do anything. We come to ask your consent. We bring no soldiers, but only words of kindness and praise. We will speak plainly so that you can understand us, and we wish you to agree to

nothing until you understand it, and not then unless your minds and hearts are willing.

"Your brethren, the Spokanes, for years have been living about the falls. The white people have gone there and settled all over their country. These Indians are very poor and unhappy. They have no lands and no homes. The Great Father has pity on them, and he wishes to place them on a better country. He wishes also that you will have pity for the Spokanes.

"In 1885 the Government sent Governor Stevens and some other Commissioners to visit and treat with the Indians in this part of the country, and, among others, he was instructed to visit the Spokanes and the Coeur d'Alenes. Governor Stevens made an honest endeavor to see them and you, and to buy your lands, but he was prevented from doing so by an Indian war which broke out about that time. I could explain to you why no other commission was sent. It is enough to say, that it was not because the Gov- [61] ernment cares nothing for the Spokanes or you, for it is true that the condition of the Spokanes has long been a matter of much concern. We have just left the Spokanes. We were with them in council for many days. They were slow to understand, but after a while we succeeded in making an agreement with them by which we hope to remedy their wrongs and bring them to a better condition. In order to do this we need the helping hand of you, the Coeur d'Alenes, and we come to ask that help from you. The President desires that they shall have houses, farms, agricultural implements, and help in other ways as a recompense for their lost country. He wishes that they all may be removed to this reservation by your consent. It is believed that by bringing them

here and locating them on farms on this reservation they will soon be in the good condition we find you. If they stay where they are it is feared that they will be ruined. Some of the whites among them are friendly to them, but some give them whisky and cards, and they are leading a bad life, and have much trouble in getting along. We think that it will not only be an act of kindness on your part to allow these poor people to come and live with you, but we also believe it will be the best for you. It is known to you that the whites much desire to get your reservation, or some of it. The whites are increasing in numbers rapidly and they are clamorous for more land. It is not right that large bodies of good land should lie idle and uncultivated. It must be worked either by white people or by Indians. If your reservation was full of Indians the whites would not want it, or ask for it. Already we have been asked to open this reservation to white settlement. Long petitions came to us while we were at Spokane Falls asking that this be done. We told them no, we have no power to do that; we came to put other Indians there who have no homes. Now you can see that we come as your friends, and we wish you to think of these things and speak freely to us. We wish to take as little of your time as possible, as you know you are farmers, and that you are needed at home. The time we will leave to your judgment. We wish also to hear from you on the subject of you lands about which you wrote to the President in your petition. We wish also to hear from you as to your wants and necessities. We wish every question fully discussed and well understood. We see you are sensible men and disposed to do right, and we think

you will have but little trouble in coming to a just conclusion.

"This business is not entirely new to us. We have visited many Indians in other places and have made agreements with them. Each of us has had experience. My friend Major Andrews, has been in the Indian office, and Dr. Daniel has been much among Indians. We are all pleased at what we have seen among you. We have seen that Indian children can learn what white children can, and that you are as good farmers as white men under the same circumstances. We are anxious to do that which is right for you. We wish to see you have justice and to improve your condition. As for myself, I can say with truth that my anxiety to succeed in our efforts to improve the condition of the Indians is greater than I ever felt in any public employment of my life."

Dr. DANIELS. My friends, the judge has said nearly all I can say. I have been a long time among the Indians. At the same time, when Governor Stevens came to this country the judge was a member of the Great Council at Washington, and I was appointed to go among the Indians. When first I went among the Indians they had as food the wild meat of the buffalo; now I see you on good farms and in your happy homes. I have seen a great many Indians, but I did not expect to see them ahead of the whites as I see them here.

You have the finest schools, the best community that I have seen among Indians, and we are well pleased. We can talk to you as we can to the whites and do business with you as with them. We are all very glad to see you."

Chief SELTICE. All right, I will assure you; you have come from afar, and our hearts are all glad to-day. We have wanted to see you; we have not doubted our Great Father, but always believed that, though he was a great ways off beyond the mountains, yet he would see us and remember us, his children; my heart is big to-day, and my people are pleased at your coming, and I am glad also. Tell us what you desire us to do, and we will do it gladly, willingly. We will try to do what is right; we are as children; yet the Great Father has us under his protection, and you promise to help us. We want your advice; we want your counsel and help. For this we thank you. I have little to say to-day and do not wish to make any mistakes. We wish to consider. You have spoken to us about the Spokanes. We are very sorry for them, and we will do all in our power to better their condition. We have heard that many of them wish to come on this reservation; our people will be well pleased if they will all come. I learn that they have two ideas; they are not as one, but I believe we can make them as one, so that they will all come here; we will try to gain their affections; we believe that they will be as one among us. You say you are well pleased at what we have done in the past; we are glad. We try to do that which will please our Great Father. You have seen our schools and you speak words of kindness and encouragement. We wish these schools to remain always with us. What we have promised the fathers and sisters before, we wish confirmed. [62] These fathers have labored faithfully among us in teaching our children; we wish what we have promised them confirmed by the Great Council, so that we will feel secure in our schools.

We think you can help us in that which we ask for; you can do what we want. We will talk more of this.

Judge WRIGHT. Do you wish to talk to us about your lands mentioned in your petition of two years ago?

SELTICE. We wish you to talk first and then we will answer you.

Judge WRIGHT. The paper which I hold in my hand [Senate document] sets out fully your claim; in that petition you say your boundary was as follows: commencing at Steptoo Butte, runs northwest to Antoine Plants on the Spokane River, thence to the Pend d'Oreille Lake, thence to the summit of the Coeur d'Alene Mountain, thence south to the most southern thereof whence flow the waters of the Palouse River, thence west along the southern rim of the water-shed of the Palouse River to the beginning.

We wish to do right about the claim; that was one purpose for which we were sent to you. On yesterday I omitted to say anything about your promise to the fathers concerning the schools. We will consider this and do all we can to satisfy your desire. You do well in appreciating your schools. If the advantages which your children enjoy had been given you it is plain that it would have aided you very much. When your children grow up to be men and women the advantages derived from those schools will be seen and felt. It will enable them to compete with the white people in the affairs of life. We will consider what is best to be done.

SELTICE. We are pleased at what you say; we know it to be good. Our chiefs have not talked together, but what

we said in our petition two years ago we wish fixed; we wish that which we promised carried into effect with the fathers and sisters, for with us they will be always. This is the great desire of our hearts.

VINCENT (Old Chief). A long time ago I was not such as you see me now; I am old. I am glad of what you are doing. It is good. I think there are two things. One is from the father and one is from you. These two things we have gained. The fathers tell us we have souls, and that we can go to heaven. This is one thing. I am talking to you only now, but many have my heart. The Spirit has care of my soul, and you of my body. I know that through you our country is saved, and from you we have found things to eat, because you have taught us how to get our food. The Coeur d'Alenes are getting along well, and you have brought us to this; you have saved our land where we are, and this we owe to the Government.

SELTICE. The land outside this reservation has been taken up by the whites, and we had forgotten it until two years ago, when we remembered it; and then we sent our petition to the Government at Washington setting forth our desires. You Gentlemen will tell us what to do, and now we will listen to any proposition you may have to make.

Judge WRIGHT. Is the land you are now living on a part of the country you speak of in your petition?

SELTICE. Yes, certainly. This is the middle of it. That which was taken lies outside all around this.

Judge WRIGHT. In your petition you say you need a saw and grist mill; mechanics to teach you trades; cattle and sheep.

SELTICE. It was a saw-mill and flour-mill.

Judge WRIGHT. Do you people need wagons?

SELTICE [after consulting with chiefs]. No; we do not need these, because we have them.

Judge WRIGHT. We believe you to be reasonable men, and we think we can pull together with you like two well-broken horses. To-morrow we will meet again. What you say is plain and frank, and it gives us pleasure. The kind manner in which you speak of the Spokane Indians, and your consent to their coming and living with you, does you honor. They can be saved by bringing them here. They will be ruined if they remain where they are. The Great Father will be pleased when he hears your kind words. It will make him feel kindly towards you.

THURSDAY, *March* 25.

Commissioner ANDREWS. Perhaps it may be well for me to say a few words to you this morning before proceeding to the business which has called us together, in order that you may be permitted to judge of the feelings which control me as well as the feelings of my two associates who addressed you on yesterday.

I, too, am the friend of the Indian, and as such friend have been sent by the honorable Secretary of the Interior, the honorable Commissioner of Indian Affairs, and by the

Great Council of the United States from the seat of Government at Washington, 3,000 miles away, to this beautiful spot, the Coeur d'Alene Reserve, in the Territory of Idaho, to visit you and assist in righting the wrongs which you and your friends say have been inflicted [63] upon you. And now, right here, I want you to understand that we were not sent on account of our great ability to deal with Indians, but because we have proved to the Great Father upon more than one occasion that we are the friends of the red man, and that we hold his rights as sacred as that of any white, black, or red man on earth. We have been commissioned to treat with you upon high and holy grounds; to give you all the rights ever accorded to any people by the wisest government on earth. We were told by the Great Father of your advancement in civilization, but little did we expect to see what we now see. Little did we expect to find you occupying the finest lands of the great West – well watered, well timbered, surrounded by all things to make life happy, with the best schools we have ever seen anywhere, with children that can teach more than half of the Government clerks in Washington how to read and write. And last, though not least, little did we expect to find such good men of God as your best earthly friends. The good fathers here are constantly looking after your welfare here and preparing your souls for the world to come. When we report all these things to the Great Father in Washington it will make his heart glad, and he will exclaim: "Long life to the Coeur d'Alenes of Idaho." I shall tell him that the brand of strong drink does not disfigure the face of a single Coeur d'Alene; that not an eye is dimmed by its damnable sting; that there is not an inch of the Coeur d'Alene

Reserve poor enough for a whisky-seller to place his unholy foot. And, lastly, I will tell him that my prayer to Almighty God was, and said aloud in your hearing, that not one drop of strong drink should ever enter the throat of a Coeur d'Alene Indian. Take this from a friend, and with such a promise faithfully kept, with such a climate and such lands as you own, with such teachers as the good fathers and sisters of DeSmet Mission, with such a friend as the great Government of the United States to protect and defend you, and, lastly, with such a noble specimen of a true and brave American as Seltice as your chief, you will be the happiest people on earth.

SELTICE. I will assure you now I am glad that you have given us such good advice. I am sorry that the white men have bad habits. We are well pleased with all you have said. You talk to us of goodness and I am glad to hear those words coming from your lips to-day. We will cherish your words in our hearts and remember them always. My heart is well pleased with all you have said.

Judge WRIGHT. Do any of you wish to speak? If so, we will hear you now.

DAMAS (chief). I am going to say a few words only. The chiefs will speak for us; we leave everything to them and whatever they say or do will all be right, as we are all of one heart and mind.

Judge WRIGHT. My friends, since our adjournment on yesterday we have given all the questions which have been discussed our careful attention. We have prepared a paper to be submitted to your council. It will all be carefully read over to you, and interpreted so that all will understand its contents. It may be that some changes will

be made. When everything is fully understood by you and an agreement reached, we will have the paper written in ink ready for signing. If in reading over the agreement there is anything you do not fully understand, or any part you wish changed or left out, you can say so.

Commissioner Andrews then read the agreement and it was carefully interpreted. After the reading of the agreement Judge Wright said: If you agree to what is here written it will be submitted to the Great Council and the Great Father for approval. If when they examine it they are pleased with it and think it good for you and good for the Government they will approve it and it will become a law. Should they disapprove it will be as a blank paper. Our duties, then, you see, are of a delicate nature. If we please you we may not please the Government. We must satisfy both or our work amounts to nothing. If the agreement meets your approval and is ratified by Congress it will undoubtedly place you in a condition in which you can be self supporting with your present advanced position. You will soon need nothing from the Government but the protection which it gives to all its citizens alike. You will have no use for Government farmers, smiths, doctors, or agents; you can get things without aid.

Seltice (chief). I will assure you now. It may take me two hours, as you have spoken much. I am glad you have taken the time, for it has not been lost. We have listened very carefully and have understood everything that you have said, and it was good. You have put new life into our veins and made us feel that the Great Father and yourselves are the true friends of our race. We know that we are Indians, yet the same Great Father cares for us all. You have spoken to us of the Spokane Indians and of

your great desire to help them. We also desire to see them happy people and that they come on this reservation. Just as the whites have poor relations, so have the Indians too – one on our father's and two on our mother's side, and thus am I related on my ancestors to many tribes in this country, and to them I extend the privilege of settling on our land; and I also ask the privilege of having good half-breeds come also. There is one thing which the whites do which we do not – they marry our women, but we never marry white women.

[64] I have considered everything you have said to us; I have considered well, and we are willing to have all these Indians come, but they must leave their whisky and their cards behind them. They must not bring whisky and cards here. This is for their good and the good of my own people. I do not want any bad people to come here and set my people an evil example. Everything you have said to us is good. One thing you have spoken to us about is our land, which the whites have taken away from us and which they now occupy. It is lost to us; it is dead to my people. We had almost forgotten it, but it has come back to our minds and we now speak of it. You say we may receive for our lost land $150,000 – for our land outside the reservation. Do you know how much there is of it? There are more than 4,000,000 of acres. This land was very dear to us, but we have given it up to the whites. We are on only a small part of our country – I mean this reservation. Here we have made our homes; here we have built our houses; here are our fences, our farms, our school-houses, our churches. Here are our wives and our children; here are the graves of our ancestors; here are

our hearts; here we have lived, and here we wish to die and be buried. We want these preserved forever.

We understand that the paper which we signed is to go to Washington to be seen by the President and the Great Council. I know your hearts with regard to it, and they are good. However you fix it, it will be right; but I plead with you, I implore you, I call on the Great Father, who will hear me, preserve for us and our children forever this reservation, where are our schools, our churches, our homes, our graves, our hearts. The Government has now thought of our claims for our lost land, and they have sent you to us. Of this we are glad, but neither money nor land outside do we value compared with this reservation. Make the paper strong; make it so strong that we and all Indians living on it shall have it forever. We also wish you to make our schools and our churches so strong that they will be here forever for our children, when we have passed away from the world and gone to the Great Father above. What has been said by you is all good, and we thank you for it. You have now seen our hearts; they are laid open and made bare before you.

Judge WRIGHT. You have done yourself great honor by your words; we honor and thank you for the words you have spoken. You have shown yourself worthy to be the leader of your people. They ought to feel proud of you. If they will but follow where you lead they will have but little to fear.

We have endeavored to carry out your desires. The Government will protect you and your lands. It will do so if it takes its whole power. It will also protect and encourage your schools.

If none of you desire to say anything more, we will prepare an agreement in writing for your signatures; we wish you all to be present; we will not delay you long.

SELTICE. We will be glad to see you again in the morning. You have the hearts of all my people. We will leave everything to Washington. Fix your hearts good for us also.

FRIDAY, *March* 26, 1887 – 9.30 a.m.

Judge WRIGHT. On yesterday we read to you the terms of the proposed agreement. We have carefully considered all the subjects which were then discussed, and have prepared it in proper form for your signatures, with some few changes which were suggested on yesterday. It is now complete. [Here the agreement was read over, interpreted, and explained.]

Do you now understand all the promises?

SELTICE. Yes; we understand everything you have said.

Judge WRIGHT. When we leave here we will next visit the Calespels, or Lower Pend d'Oreilles, and before visiting them we though it best to obtain your consent that they might be removed to this reservation. If they conclude to come here this will save the trouble and expense of another visit to you.

SELTICE. How about our agent? Is he to be paid out of the fund provided by the agreement?

Judge WRIGHT. No; the agent will be paid by the Government.

SELTICE. All right. We shall not need the sawyer or miller more than a year. By that time we will be able to do the work ourselves. Our people will soon learn to run the mill.

LOUIS GASTAZTAIN. We are all glad you have come to see us. Since you came I-have looked into what you have been saying. You have spoken to us of our country. When they ran the survey of our reservation we thought the land was all lost to us. This has been troubling our minds and the minds at Washington ever since. I did not want to take any money; but we are now all of one mind, and we will take it because it will help us. It is not much for the land which has been taken away from us. We are very poor. We are very near the time when we are to sign the paper. We will take good care of the money. When we first came on this reservation we were poor, and now you see us with homes, our farms all fenced, and cattle grazing on our hills. The fathers have [65] taught us to do this – to farm and save our money and educate our children. I myself can not read or write; but we are very thankful to the Government for our schools. Some of our people are old, and they would like to have their money paid to them before they die, so they can have some benefit from it. You have seen my heart.

ELIJAH (a Spokane Indian, the only one present wearing a blanket). Is Lots' reservation as good as this?

Major WATERS. No; no part of it can compare with it.

ELIJAH. Then I am coming here, and I will tell all my people to come and take up this land; the Coeur d'Alenes are our friends.

Judge WRIGHT. We will sign the paper first and then you can sign. [Here the agreement was signed by the Commissioners and all the Indians. When Nicodemus came up to sign Judge Wright said to him:] I am informed that you were the first Indian on this reservation who took a farm and put a plow in the earth, and I learn that you have done well, and that you are now comfortably situated. Major Waters tells us that you have always set a good example to the Indians, and that hundreds have followed your advice and example. For this you deserve well, and you should be remembered and encouraged.

NICODEMUS. As soon as I began to plow I began to see food and money. I thank you for your words.

Judge WRIGHT. I believe all have signed. A large majority of the tribe have signed the agreement, and those who are not here would sign if they were present. When you tell the absent ones what you have done they will be well pleased. You have behaved well. You have shown your confidence in the Great Father and it will give us pleasure to say that you deserve well of the Government. Your consent that the other Indians not so well off may come on your reservation speaks well for your hearts. Your matters are in good condition. You are on the right road. Be at peace with one another and your neighbors. In all your transactions as a tribe remain reunited. This will give you strength. Advise the Spokanes to come. When they come treat them kindly. If they have faults, pity them and lead them in the right way. Treat them as the Great Father above treats us in mercy. Call them from their evil ways and make them as you are.

ADRIAN UMAH. I am glad you have talked to us from the law. You have made our homes secure. When we are sick the priests hold us in their hands and bring us to heaven. You have told us the truth.

SELTICE. You are now going to leave us and go back to Washington. When you go away do not forget us. Our brains are big and we have put away your words in a safe place. We shall remember them always. We shall not forget you nor your words. We are only Indians. We are not so high in knowledge as you are, but your words of advice made us even with you. Your coming has done us all good. We looked for your coming for many days. Sometimes we feared you would forget us and pass us by. Major Waters did not deceive us; he told us to be patient and you would come. We ask you to take back to the Great Father our humble expressions of peace and good will. The Coeur d'Alenes will ever be his friends. You have lifted a heavy load from our hearts. We take courage and a new start. Our land, our homes, our schools are to be ours forever. All this we feel is from your coming. In the name of my chiefs and my people I thank you.

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EXHIBIT 214

50th CONGRESS. *1st Session.* SENATE. MIS. DOC. No. 36.

IN THE SENATE OF THE UNITED STATES.

JANUARY 23, 1888. – Ordered to be printed.

Mr. MITCHELL submitted the following

RESOLUTION:

Whereas it is alleged that the present area of the Coeur D'Alene Indian Reservation, in the Territory of Idaho, embraces 480,000 acres of land: that there are, according to the statistics in the Indian Bureau, only about 476 Indians in the tribe now occupying such reservation, or more than 1,000 acres to each man, woman, and child; that Lake Coeur D'Alene, all the navigable waters of Coeur D'Alene River, and about 20 miles of the navigable part of Saint Joseph River, and part of Saint Mary's, a navigable tributary of the Saint Joseph, are embraced within this reservation, except a shore-line of about 3½ miles at the north end of the lake, it being alleged that this lake and its rivers tributary constitute the most important highways of commerce in the Territory of Idaho, and are in fact the only navigable waters, except Snake River, now used for steam-boat navigation in the Territory; that all boats now entering such waters are subject to the laws governing the Indian country and all persons going on such lake or waters within the reservation lines are trespassers; and

Whereas it is further alleged that the Indians now on such reservation are located in the extreme southwest corner of the same around De Smedt Mission, near the town of Farmington, in Washington Territory, where the land is good for agriculture; and it being further alleged that all that part of such reservation lying between Lake Coeur D'Alene and Coeur D'Alene River and that part between the Coeur D'Alene River and Saint Joseph River is a territory rich in the precious metals and at the same time being of no real use or benefit to the Indians: Therefore,

Resolved, That the Secretary of the Interior be, and he is hereby directed to inform the Senate as to the extent of the present area and boundaries of the Coeur d'Alene Indian Reservation in the Territory of Idaho; whether such area includes any portion, and if so, about how much of the navigable waters of Lake Coeur d'Alene, and of Coeur D'Alene and St. Joseph Rivers; about what proportion of said reservation is agricultural, grazing, and mineral land respectively; also the number of Indians occupying such reservation; also on what portion of such reservation the Indians now thereon are located; also whether, in the opinion of the Secretary, it is advisable to throw any portion of such reservation open to occupation and settlement under the mineral laws of the United States, and, if so, precisely what portion; and also whether it is advisable to release any of the navigable waters aforesaid from the limits of such reservation.

EXHIBIT 213

50th Congress, 1st Session. SENATE. Ex. Doc. No. 76.

LETTER
FROM
THE SECRETARY OF THE INTERIOR,
TRANSMITTING,

In response to Senate resolution of January 25, 1888, information about the Coeur d'Alene Indian Reservation, in Idaho.

FEBRUARY 13, 1888 – Ordered to be printed, and referred to the Committee on Indian Affairs.

DEPARTMENT OF THE INTERIOR,
Washington, February 9, 1888.

SIR: I have the honor to acknowledge the receipt by the Department, on the 26th day of January last, of a resolution of the Senate, adopted upon the 25th of January, 1888, which, omitting the preamble thereto, is in the following words:

Resolved, That the Secretary of the Interior be, and he is hereby, directed to inform the Senate as to the extent of the present area and boundaries of the Coeur d'Alene Indian Reservation in the Territory of Idaho; whether such area includes any portion, and if so about how much, of the navigable waters of Lake Coeur d'Alene and of Coeur d'Alene and St. Joseph Rivers; about what proportion of said reservation is agricultural, grazing, and mineral lands, respectively; also the number of Indians

occupying such reservation; also on what portion of said reservation the Indians now thereon are located; also whether, in the opinion of the Secretary, it is advisable to throw any portion of such reservation open to occupation and settlement under the mineral laws of the United States, and, if so, precisely what portion; and also whether it is advisable to release any of the navigable waters aforesaid from the limits of such reservation.

In response thereto I transmit herewith a communication, under date of the 7th instant, from the Commissioner of Indian Affairs, to whom the resolution was referred to report the facts required to properly meet the inquiries therein contained. This report states that the Coeur d'Alene Reservation, in the Territory of Idaho, embraces an area of 598,500 acres – 935 square miles; that it is situated in the northern portion of the Territory, between the 47th and 48th parallels of north latitude, and presents as an exhibit a map showing the outline boundaries of the reservation. It describes the portions of the navigable waters of Lake Coeur d'Alene and of the Coeur d'Alene River which traverses the reservation, and states the absence of information necessary to show how much of the St. Joseph River, which flows through the reservation, is navigable, or whether it is navigable at all.

The Commissioner also reports that as but a small portion of the reservation has been surveyed (less than three townships), he is unable to furnish more than a rough estimate of a character of the lands embraced therein, which is that at least one third of its entire area is agricultural, one-third mountain and timber, and the remainder hilly and probably suitable for pasturage; that east of the lake and north of the Coeur d'Alene River the lands are described as "all mountains," and along the

north line of the reservation, also east of the lake, are lands described as mineral lands. He also reports the number of Indians upon the reservation, as per last census, to be 487, nearly all of whom he believes live on that portion of the reservation lying south of the Lake Coeur d'Alene and St. Joseph River, and not far away from the Old Mission on Hangman's Creek.

The Commissioner further states that, in his opinion, the reservation might be materially diminished without detriment to the Indians, and that changes could be made in the boundaries for the release of some or all of the navigable waters therefrom which would be of very great benefit to the public; but this should be done, if done at all, with the full and free consent of the Indians, and they should, of course, receive proper compensation for any lands so taken.

In connection with this matter the Commissioner refers to the negotiations lately authorized by Congress and concluded with these Indians for the cession of their lands outside the limits of the present Coeur d'Alene Reservation, as shown by agreement published in House Ex. Doc. No. 63, Fiftieth congress, first session, pp. 53-56, under the provisions of which arrangement has been made for the removal to an settlement upon said reservation of sundry non-reservation Indians; and he reports as his opinion that when the present agreement shall have been ratified it will be an easy matter to negotiate with the Coeur d'Alenes for the cession of such portions of their reservation as they do not need, including all or a portion of the navigable waters, upon fair and very reasonable terms.

I have the honor to be, very respectfully,

H. L. Muldrow,
Acting Secretary.

The President Pro Tempore of the Senate.

Department of the Interior,
Office of Indian Affairs,
Washington, February 7, 1888.

SIR: I have the honor to acknowledge the receipt, by your reference the 26th ultimo for report, of a resolution of the Senate of the United States of January 25, 1888, as follows:

Whereas it is alleged that the present area of the Coeur d'Alene Indian Reservation, in the Territory of Idaho, embraces 480,000 acres of land; that there are, according to the statistics in the Indian Bureau, only about 476 Indians in the tribe now occupying such reservation, or more than 1,000 acres to each man, woman, and child; that Lake Coeur d'Alene, all the navigable waters of Coeur d'Alene River, and about 20 miles of the navigable part of St. Joseph River, and part of St. Mary's, a navigable tributary of the St. Joseph, are embraced within this reservation, except a shore-line of about 3½ miles at the north end of the lake, it being alleged that this lake and its rivers tributary constitute the most important highways of commerce in the Territory of Idaho, and are in fact the only navigable waters except Snake River, now used for steam-boat navigation, in the Territory; that all boats now entering such waters are subject to the laws governing the Indian country, and all persons going on such lake or waters within the reservation lines are trespassers; and

Whereas it is further alleged that the Indians now on such reservation are located in the extreme southwest corner of the same, around De Smedt Mission, near the town of Farmington, in Washington Territory, where the land is good for agriculture; and it being further alleged that all that part of such reservation lying between Lake Coeur d'Alene and Coeur d'Alene River and that part between the Coeur d'Alene River and St. Joseph River is a territory rich in the precious metals and at the same time being of no real use or benefit to the Indians:

Therefore,

Resolved, That the Secretary of the Interior be, and he is hereby, directed to inform the Senate as to the extent of the present area and boundaries of the Coeur d'Alene Indian Reservation in the Territory of Idaho; whether such area includes any portion, and, if so, about how much of the navigable waters of Lake Coeur d'Alene, and of Coeur d'Alene and St. Joseph Rivers; about what proportion of said reservation is agricultural, grazing, and mineral land, respectively; also the number of Indians occupying said reservation; also on what portion of such reservation the Indians now thereon are located; also whether, in the opinion of the Secretary, it is advisable to throw any portion of such reservation open to occupation and settlement under the mineral laws of the United States, and, if so, precisely what portion; and also whether it is advisable to release any of the navigable waters aforesaid from the limit of such reservation.

Agreeably with the directions contained in said resolution I have the honor to state:

(1) The Coeur d'Alene Reservation, in the Territory of Idaho, embraces an area of 598,500 acres, or 935 square miles.

It lies in the northern portion of said Territory, between the forty-seventh and forty-eighth parallels of north latitude, and has for its western boundary the dividing line between Idaho and Washington Territories.

It is somewhat in the shape of a scalene triangle with one of its points cut off, its longest side (east boundary line) being about 42 miles, and its shortest (north boundary line) about 35 miles long. The west line is about 39 miles long.

From the official map of Idaho (1883) and sundry others examined, the reservation appears to embrace all the navigable waters of Lake Coeur d'Alene, except a very small fragment cut off by the north boundary of the reservation which runs "in a direct line" from the Coeur d'Alene Mission to the head of Spokane River.

This lake is about 35 miles long and from 2 to 5 miles wide.

The Coeur d'Alene River traverses the reservation for a distance of about 25 miles, entering the reservation from the east and emptying into Lake Coeur d'Alene.

The St. Joseph River also flows through the reservation, entering from the east and finding its outlet in said lake.

The Coeur d'Alene River is navigable in its entire course through the reservation, and streamers ply from the head of the lake to the mouth of the river, and thence up the river to the Old Mission on the east line of the reservation, a river passage of about 25 miles. How much farther the river is navigable toward its source and

beyond the limits of the reservation I have no means of knowing.

I am unable to furnish any information as to how much of the St. Joseph River is navigable, or whether indeed it is navigable at all. From the maps it would appear to be quite as large as the Coeur d'Alene River.

As to what proportion of the reservation is agricultural, grazing and mineral land, respectively, I have to state that as but a very small portion (less than three townships) of the reservation has been surveyed, I am unable to furnish any thing more than a rough estimate of the areas of the several classes referred to. From a rude sketch of the reservation prepared by the farmer in charge, with a view to showing as nearly as possible the character of the lands embraced within the reservation, I should judge that at least one-third of the entire area of the reservation is agricultural, one-third mountain and timber, and the remainder hilly and probably suitable for pasturage.

I inclose a copy of the map or sketch, and invite especial attention to it as giving the most satisfactory information obtainable from the records of this office. It is drawn upon a scale of 2 miles to the inch.

It will be observed that the lands in the extreme northern portion of the reserve, west of the lake, for a distance of 10 or 12 miles south, are described as "timbered lands on mountains, with small valleys of pasture lands." From thence south to the hills south of the Farmington Landing road they are set down either as first or second class "agricultural lands," and so of all the lands lying directly south of the lake until the "hill-land" is

reached. Then south of the hilly lands, extending along the entire course of Hangman's Creek, is a wide strip described as "agricultural lands, first class."

East of the lake and north of the Coeur d'Alene River the lands are described as "all mountains," and along the north line of the reservation, also east of the lake, are lands described as "mineral lands."

A strip one-half mile wide on both sides of the Coeur d'Alene River along its entire length is described as "fertile valley, overflowed every spring."

South of the Farmington road and along the entire east line of the reservation is a broad strip varying from 2 to 8 miles wide, described as "all hill-land; is timbered, and soil third rate, in places rocky."

The west side of Coeur d'Alene Lake appears to be skirted all along with timbered mountains or hills.

A map accompanying the report of an inspection made in 1886 by Lieut. Col. H.M. Lazelle, Twenty-third Infantry, acting inspector-general, Department of the Columbia, with reference to the sale of liquor upon the steamer *Coeur d'Alene* within the navigable waters of the reservation, will be found valuable, as showing the location of the neighboring towns and mines with reference to the reservation, the steam-boat route through Lake Coeur d'Alene, and the Coeur d'Alene River, the wagon roads and trails entering and crossing the reservation, mountain ranges, railroads, etc., and I have thought best to have a copy of said map made to accompany this report.

It might be proper to state here that Inspector Gardner, who visited the Coeur d'Alene Reservation in September of last year, places a much smaller estimate upon the quantity of agricultural land within the reservation than the farmer's map would indicate, but he could hardly be expected to have as perfect a knowledge of the reservation as the resident farmer in charge.

Inspector Gardner says:

The land embraced in the Coeur d'Alene Reserve, 598,500 acres, is in Idaho Territory. It is rough and very mountainous, and not more than 50,000 or 60,000 acres susceptible of profitable cultivation. * * * A large portion of the reservation is heavily timbered.

The number of Indians occupying the reservation as per last census, taken June 30, 1887, is 487. I believe all, or nearly all, live on that portion of the reservation lying south of the Lake Coeur d'Alene and St. Joseph River, and nor far from the Old Mission on Hangman's Creek.

The question which remains to be answered is, whether it is advisable to throw any portion of the said reservation open to occupation and settlement under the mineral laws of the United States and, if so, precisely what portion, and whether it is desirable to release any of the navigable waters mentioned in the resolution from the limits of said reservation.

In approaching this question, I deem it proper to refer briefly to the character and condition of the Indians occupying the reservation and the situation of affairs as existing amongst them.

There are few Indians in the entire country, if we except the five civilized tribes, who are as far advanced,

and even they need not be excepted in any comparison either of their virtues, habits of industry, loyalty, or ambition to attain a higher stage of civilization.

They cultivate the soil extensively, live in comfortable houses, dress like the whites, wear short hair, and in all other respects live and do as white people do. Their houses are painted inside and outside, their barns are well built and commodious, and they have all the improved farm implements and machinery. They own large bands of cattle and horses and an abundance of hogs and poultry.

The Northwest Indian Commission, in the report of its recent visit to these Indians, said:

Each one has a comfortable house on his farm, and nearly all have equally comfortable houses at the mission, which together make quite a village. They remain on their farms during the week days, and on the Sabbath repair to their dwellings at the village to attend religious services and see their children who are at the Mission schools.

* * * Long experience in self-reliance and traffic with the neighboring whites has made them cautious, shrewd, and provident in the use of money. We learned that their trade in one town adjacent to the reservation amounts to about $25,000 yearly. * * * A better ordered and better behaved Indian community can nowhere be found.

Furthermore, the Coeur d'Alene Indians have been for many years the firm friends of the whites. A notable instance of this was the part they took in the memorable Nez Percé outbreak of 1878. They not only shielded and protected the whites in that disastrous war to the fullest extent of their power, but guarded their property at the

peril of their own lives, when a large portion of the white population had fled the country for safety.

When peace was restored the people acknowledged their good services and thanked them in formal terms, promising also to assist them in obtaining permanent title to their homes.

I have said this much in order to show that the Coeur d'Alene Indians are quite intelligent and fully capable of understanding their relations to their white neighbors, and that they would be likely to take a sensible view of any proposition for a change of the boundaries of their reservation which public necessity or convenience would seem to require, and at the same time to show that they are deserving of fair and honest treatment from the whites.

The one thing that has given them trouble has been the fear of losing their homes. They have watched the progress of white settlement in the surrounding country, the discovery of valuable mines, the building of railroads, etc., and all this has made them apprehensive lest in some way their reservation might be wrested from them.

In 1884 their agent reported as follows:

The rapid progress they are making, and the great interest manifested by them in their farm work, in the fences, cultivation, in improving the breed of their horses and cattle, and in fact in all things, is commendable.

It was feared in the early spring that the great rush to the Coeur d'Alene gold mines would cause considerable trespassing upon their reserve, but happily so many other routes were opened to them that there were but few crossing the reserve, and now it has nearly ceased.

And again in 1885:

The Coeur d'Alenes on the Coeur d'Alene Reserve in Idaho are flourishing in the highest degree, being wholly independent of the Government, save in the support of their schools and the instruction they receive from their farmer. What they most dread is that their lands will be taken from them some day by the whites, or they be forced to take up small allotments, while now many of them have large fields inclosed with post and board fences, or good substantial rails. Some half-dozen of them have 200 acres of land under cultivation.

And in 1886:

There has been much talk of late by the whites of having their reserve thrown open to settlement, which has troubled Saltice, their chief, very much. He, however, felt somewhat satisfied when I assured him that if such steps were taken by the Government he and his people would receive their land in severalty before the whites would be permitted to enter.

I have taken some pains to ascertain, by reference to the correspondence and otherwise, whether the Indians would be likely to consent to a reasonable reduction of their reservation, and I am satisfied that they would upon anything like just and reasonable terms, and my own opinion is that the reservation might be materially diminished without detriment to the Indians, and that changes could be made in the boundaries for the release of some or all of the navigable waters therefrom, which would be of very great benefit to the public; but this should be done, if done at all, with the full and free consent of the Indians, and they should, of course, receive proper compensation for any land so taken.

Just what portion of the reservation and navigable waters should be segregated from the reservation, I am unable to say. That, I think, should be determined by negotiations with the Indians.

As bearing upon the subject of the inquiries presented in the Senate resolution, I quote the following from the report of Inspector Gardner, already cited:

On the north and east side of the reserve (Coeur d'Alene) is a section of very mountainous country, known as "Wolf Lodge district." The Indians do not use this, and only occasionally go there hunting for elk and deer. The mountains in this district are said to contain large quantities of valuable minerals. Already prospectors have made their appearance and are only deterred from developing same by occasional presence of the military, who would eject them, and the agent would cause their arrest for trespassing on an Indian reservation. For farming, grazing, or, in fact, for any purpose whatever, this mountain district is approximately valueless to the Coeur d'Alene Indians, but could be advantageously utilized by the whites in developing the mineral resources of same. And, in view of these facts, I see no reason why proper legislation should not be had authorizing the Indians to dispose of their title to same to the United States.

I also quote the following from a report by Special Agent G.W. Gordon, of this Bureau, who visited the Coeur d'Alene Indians upon official business in August last:

There is great eagerness on the part of the whites to locate mining claims on the mineral portion of the reserve, and especially in that section known as "Wolf Lodge," and we found mining claims numerously staked off in that section and in some cases notices posted, though we did not find the parties themselves on the

reserve. These mining prospectors are constantly on this portion of the reserve, and it seem next to impossible to keep them off with the means at hand. They are doing no injury, however, further than simply locating mining claims with a view to their possession when that part of the reserve is opened to settlement, as it seems to be believed by them it will be at an early day.

It may be proper to add that the special agent found the Indians decidedly opposed to taking their lands in severalty under the general allotment act. This may be accounted for in part, I think, by the fact that some of them have individually much more land under cultivation than they would be entitled to under the act, and they naturally desire to keep all they have.

Upon this subject the special agent says:

While on the reserve we held a general and well-attended council of the Indians, in order to obtain their views in regard to taking their lands in severalty, and after a clear understanding as to what was desired by the Government, they decided by a unanimous vote adversely to taking in severalty otherwise than they now hold them. These Indians, as you are doubtless aware, are settled on farms of their own selection, are self-supporting and making gratifying progress in agriculture, while they have good schools and their children generally being educated.

In conclusion I will state that in my opinion these Indians have all the original Indian rights in the soil they occupy. They claimed the country long before the lines of the reservation were defined by the executive order of 1873, and the present reservation embraces only a portion of the lands to which they laid claim. This claim has been recognized in various ways and at sundry times, and the

last congress authorized the Secretary of the Interior to negotiate with them "for the cession of their lands outside the limits of the present Coeur d'Alene Reservation to the United States." Pursuant to that authority negotiations were conducted with them in March last and an agreement concluded, which is now before Congress for ratification. The agreement is published in House Ex. Doc. No. 63, Fiftieth Congress, first session, pp. 53-56.

It should be stated also that provision is made in said agreement for the removal and settlement upon the Coeur d'Alene Reservation of the Upper and Middle Bands of Spokane Indians, now residing in and around Spokane Falls, in Washington Territory, and also the Calispels, now residing in the Calispel Valley, and any others of the non-reservation Indians belonging to the Colville Agency, and it is confidently hoped and expected that if the agreement is ratified and confirmed the Spokanes, numbering between 350 and 400 souls, will be removed and settled there.

However, there undoubtedly is an abundance of good farming land in the extreme southern portion of the reservation for all the Indians who will be likely to go there, and much to spare.

I think that when the present agreement shall have been ratified it will be an easy matter to negotiate with them for the cession of such portions of their reservation as they do not need, including all or a portion of the navigable waters, upon fair and very reasonable terms.

In addition to the two maps spoken of in this report, I transmit herewith a tracing of the official map of the survey of "so much of the outboundaries of the Coeur

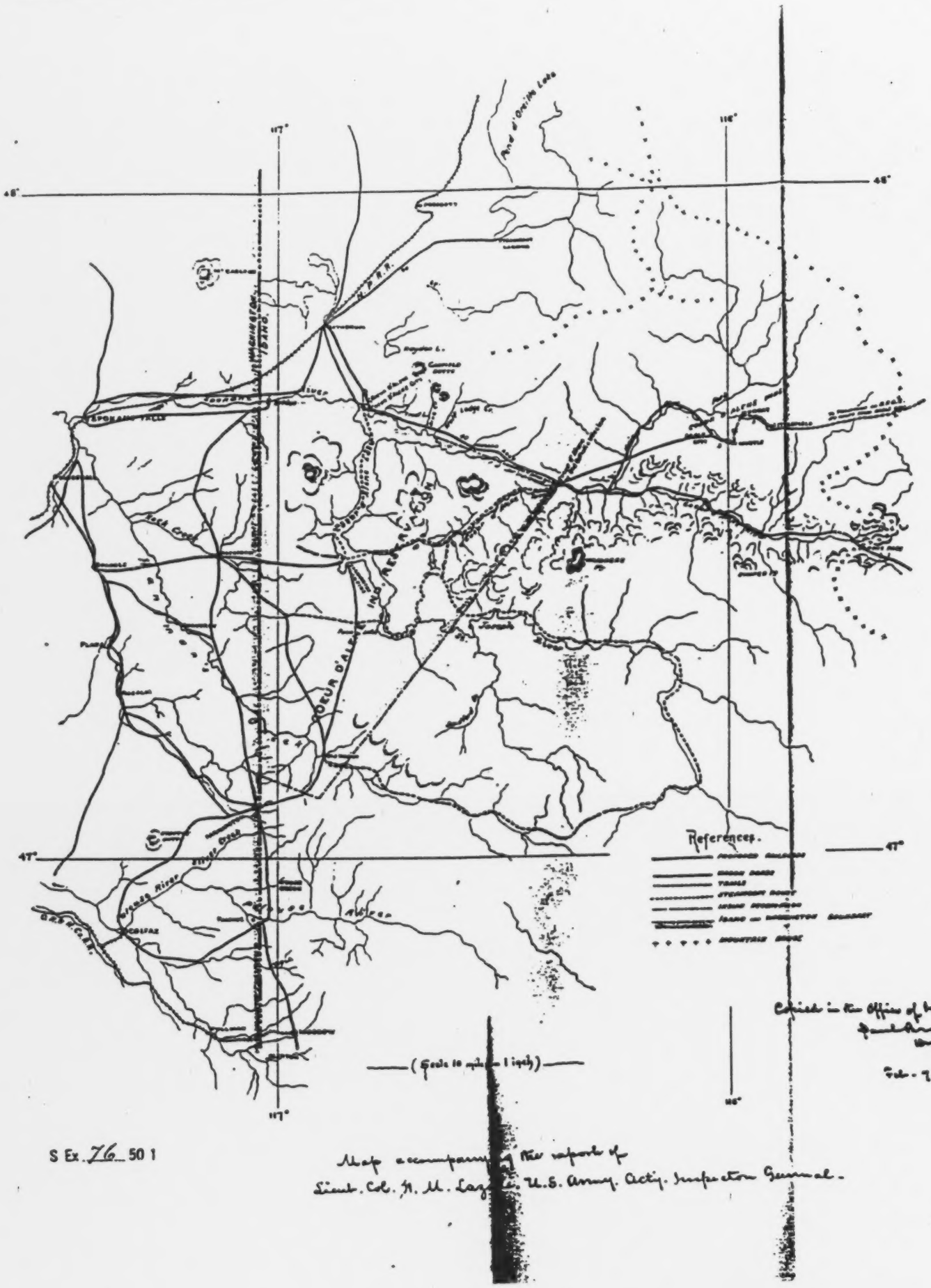
d'Alene Indian Reservation in Idaho as are not marked by prominent natural boundaries and by the surveyed line between Idaho and Washington Territories," as surveyed in 1883 by Darius F. Baker, United States deputy surveyor.

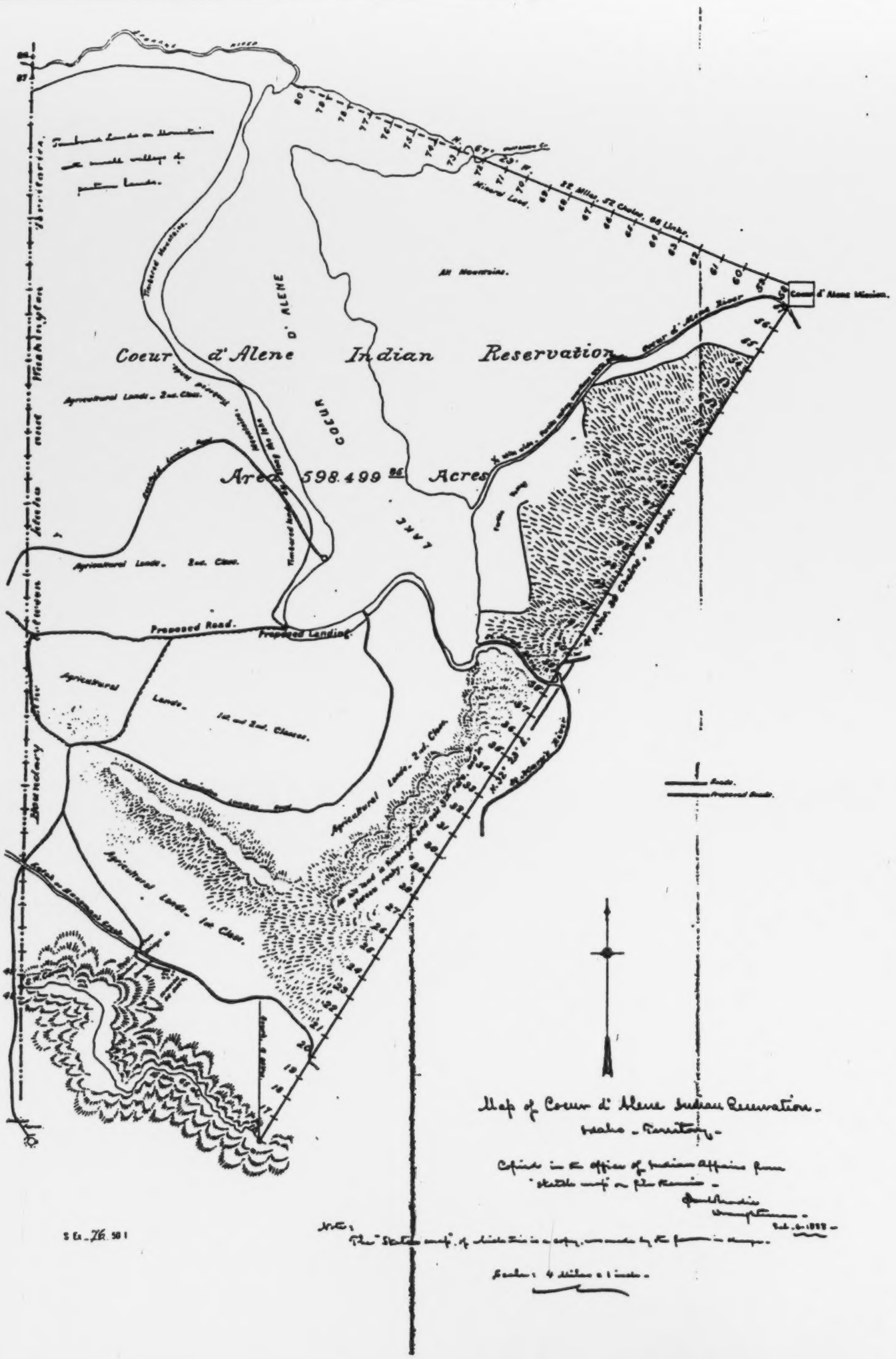
A copy of this report is herewith inclosed, and also the Senate resolution.

Very respectfully, your obedient servant,

J. D. C. Atkins,
Commissioner.

The Secretary of the Interior.


References.
Coeur d'Alene Lake
Spokane River
Little Spokane River
Hangman Creek
Hangman Creek
Spokane Falls
Coeur d'Alene Ind. Reservation
Spokane Indian Reservation
Colville Indian Reservation
Big Bend
Columbia River
Kettle River
Okanogan River
Okanogan
Similkameen
Similkameen River
Kettle River
Big Bend
Columbia



Map of Coeur d'Alene Indian Reservation.
Idaho - Territory.

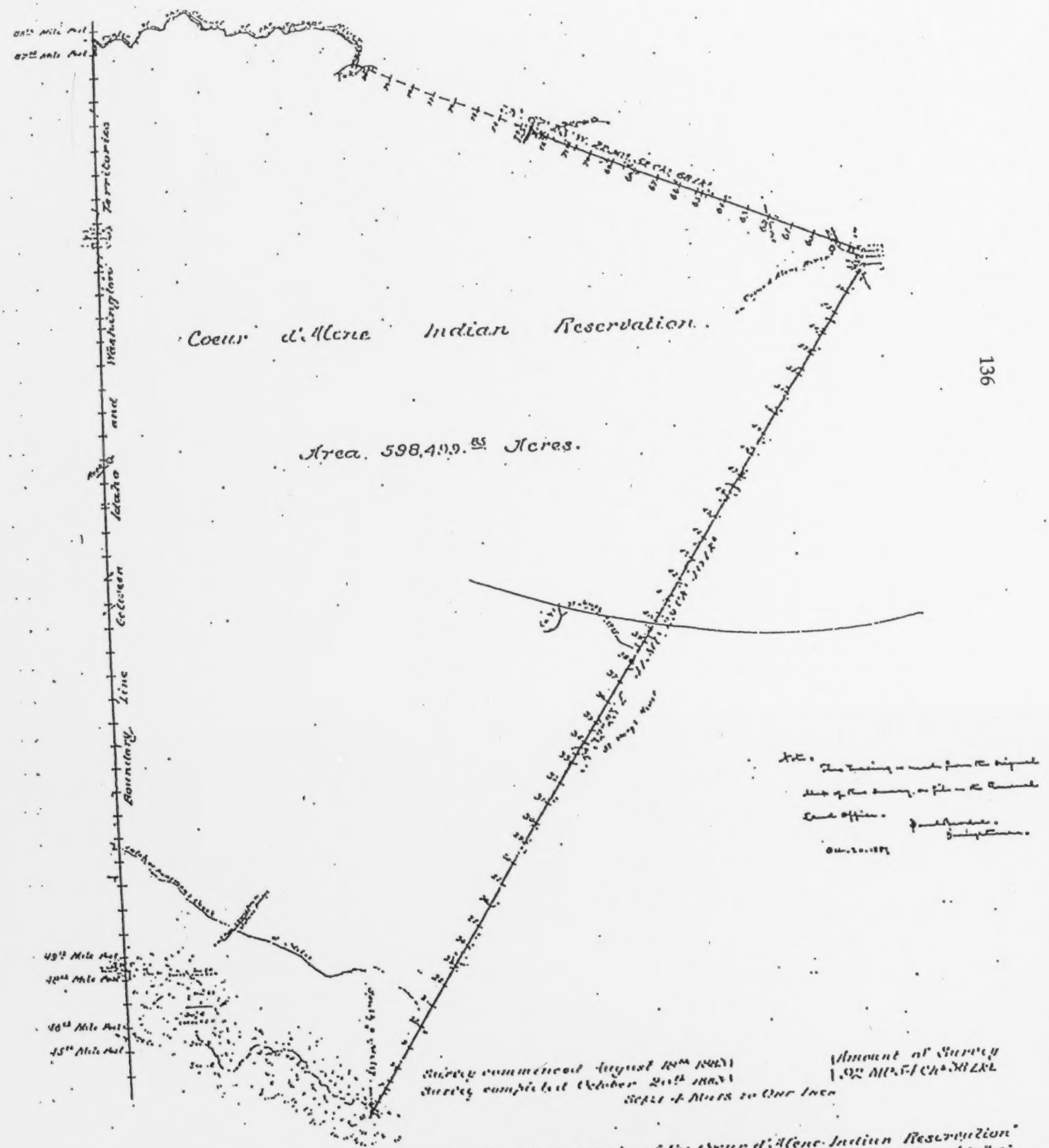
Copied in the office of Indian Affairs from
"Sketch map" on file therein.

Approved
Commissioner.

Feb. 6th 1909.

Note:
The "Sketch map" of which this is a copy, was made by the Surveyor in charge.

S.G. - 76. 501



The above Map of so much of the out boundaries of the Coeur d'Alene Indian Reservation in Idaho as are not marked by prominent natural boundaries and by the surveyed line between Idaho and Washington Territories as surveyed by Burton F. Baker U.S Deputy Surveyor, under his contract dated April 5th 1881, is strictly conformable to the field notes of the survey thereof on file in this Office, which have been examined and approved.

U.S Surveyor General's Office
Boise City, Idaho Territory.
May 15th 1884.

U.S Surveyor General for Idaho

EXHIBIT 99

INDIAN AFFAIRS.

LAWS AND TREATIES.

Vol. I.

(LAWS.)

Compiled to December 1, 1902.

COMPILED AND EDITED

BY

CHARLES J. KAPPLER, LL. M.,

CLERK TO THE SENATE COMMITTEE ON
INDIAN AFFAIRS.

May 30, 1888.

25 Stat. 160

CHAP. **336.** – An act granting to the Washington and Idaho Railroad Company the right of way through the Coeur d'Alene Indian Reservation.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the right of way is hereby granted, as hereinafter set forth, to the Washington and Idaho Railroad Company, a corporation organized and existing under the laws of the Territory of Washington for the extension of its railroad through the lands in Idaho Territory set apart for the use of the Coeur d'Alene Indians by executive order, commonly known as the Coeur d'Alene Indian Reservation,

beginning at a point on the westerly line of said reservation near the junction of the Washington and Idaho Railroad with the Idaho Branch of said road, near Lone Pine, in Washington Territory, and running thence in a northerly direction across the Coeur d'Alene Indian Reservation to a point near the mouth of the Saint Joseph's River, on the Coeur d'Alene Lake, thence in a northeasterly direction along the east side of the Coeur d'Alene Lake to the Coeur d'Alene River, and thence in a generally easterly direction, by the Coeur d'Alene Mission, to the east line of the reservation.

SEC. 2. That the right of way hereby granted to said company shall be seventy-five feet in width on each side of the central line of said railroad as aforesaid: and said company shall also have the right to take from said lands adjacent to the line of said road material, stone, earth, and timber necessary for the construction of said railroad; also, ground adjacent to such right of way for station-buildings, depots, machine-shops, side-tracks, turnouts, and water-stations, not to exceed in amount three hundred feet in width and three thousand feet in length for each station, to the extent of one station for each ten miles of road.

SEC. 3. That it shall be the duty of the Secretary of the Interior to fix the amount of compensation to be paid the Indians for such right of way, and provide the time and manner for the payment thereof, and also to ascertain and fix the amount of compensation to be made individual members of the tribe for damages sustained by them by reason of the construction of said road; but no right of any kind shall vest in said railway company in or to any part of the right of way herein provided for until plats

thereof, made upon actual survey for the definite location of such railroad, and including the points for station-buildings, depots, machine-shops, side-tracks, turnouts, and water-stations, shall be filed with and approved by the Secretary of the Interior, which approval shall be made in writing and be open for the inspection of any party interested therein, and until the compensation aforesaid has been fixed and paid: and the surveys, construction, and operation of such railroad, including charges of transportation, shall be conducted with due regard for the rights of the Indians, and in accordance with such rules and regulations as the Secretary of the Interior may make to carry out this provision: *Provided*, That the consent of the Indians to said right of way shall be obtained by said railroad company in such manner as the Secretary of the Interior shall prescribe, before any right under this act shall accrue to said company.

SEC. 4. That said company shall not assign or transfer or mortgage this right of way for any purpose whatever until said road shall be completed: *Provided*, That the company may mortgage said franchise, together with the rolling-stock, for money to construct and complete said road: *And provided further*, That the right granted herein shall be lost and forfeited by said company unless the road is constructed and in running order across said reservation within two years from the passage of this act.

SEC. 5. That said railway company shall accept this right of way upon the express condition, binding upon itself, its successors and assigns, that they will neither aid, advise, nor assist in any effort looking towards the changing or extinguishing the present tenure of the Indians in their land, and will not attempt to secure from

the Indian tribes any further grant of land or its occupancy than is hereinbefore provided: *Provided,* That any violation of the condition mentioned in this section shall operate as a forfeiture of all the rights and privileges of said railway company under this act.

SEC. 6. That Congress may at any time amend, add to, alter, or repeal this act.

Received by the President, May 18, 1888.

[NOTE BY THE DEPARTMENT OF STATE. – The foregoing act having been presented to the President of the United States for his approval and not having been returned by him to the house of Congress in which it originated within the time prescribed by the Constitution of the United States, has become a law without his approval.]

EXHIBIT 188

REPORTS OF COMMITTEES

[Page 8754]

CONGRESSIONAL RECORD – SENATE
SEPTEMBER 20, [1888]

Mr. DAWES. I am instructed by the Committee on Indian Affairs to report favorably, without amendment, the bill (S.3557) to ratify and confirm certain agreements with the Upper and Middle bands of Spokane Indians, the Coeur d'Alene Indians, the Lower Pend d'Oreille or Calispel Indians, and the confederated bands of Flathead, Pend d'Oreille, and Kootenay Indians, in Washington, Idaho, and Montana Territories, and for other purposes.

Mr. President, I have had occasion to ask many indulgences of the Senate in regard to bills from the Committee on Indian Affairs, but this bill comes to the Senate under peculiar circumstances, and I should like to state what it is and ask further indulgence that it may be put on its passage now.

The PRESIDENT *pro tempore*. The Chair will receive formal mounting business, if there be no objection, and recognize the Senator later.

Mr. DAWES. Very well.

* * *

[Page 8755] REMOVAL OF INDIANS

Mr. DAWES. I ask unanimous consent that the bill I reported this morning from the Committee on Indian

Affairs may be considered at this time. I will state to the Senate, if it is desired, the reason why I ask action now.

Mr. MITCHELL. I wish to inquire if it will take any time.

Mr. DAWES. No longer than to read the bill, I am confident. If it should, of course I would not press its consideration now.

The PRESIDENT *pro tempore*. The title of the bill will be stated.

The CHIEF CLERK. A bill (S. 3557) to ratify and confirm certain agreements with the Upper and Middle bands of Spokane Indians, the Coeur d'Alene Indians, the Lower Pend d'Oreille or Calispel Indians, and the confederated bands of Flathead, Pend d'Oreille, and Kootenay Indians, in Washington, Idaho, and Montana Territories, and for other purposes.

Mr. DAWES. The purpose of the bill is to provide the immediate relief of these Indians. The Department of the Interior has information that they are in a very destitute and starving condition at this moment. The bill provides for their removal to the Couer d'Alene and Colville reservations, where they will be abundantly well taken care of. The agreements made for that purpose were made two years ago, but have failed to be brought to the consideration of Congress for ratification until now.

A special messenger, an exceedingly intelligent Catholic priest, has been sent here on purpose to bring to the attention of the Department the destitute condition of these Indians at this moment. The Department sent him to the committee this morning. The bill has been reported

unanimously. To pass it will take no longer than to read it.

By unanimous consent, the Senate, as in Committee of the Whole, proceeded to consider the bill.

The bill was reported to the Senate without amendment, ordered to be engrossed for a third reading, read the third time, and passed.

The preamble was agreed to.

* * *

EXHIBIT 3253

Act of March 2, 1889
25 Stat. 980, 1002

CHAP. 412. – An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June thirtieth, eighteen hundred and ninety, and for other purposes.

* * * *

SEC. 4. That the Secretary of the Interior be, and he is hereby, authorized and directed to negotiate with the Coeur d'Alene tribe of Indians for the purchase and release by said tribe of such portions of its reservation not agricultural and valuable chiefly for minerals and timber as such tribe shall consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress and for the purpose of such negotiation, the sum of two thousand dollars, or so much thereof as may be necessary, is hereby appropriated out of any money in the Treasury not otherwise appropriated; the action of the Secretary of the Interior hereunder to be reported to Congress at the earliest practicable time.

EXHIBIT 3160

Brief in reply to the following:
Law and Land

Department of the Interior,
OFFICE OF INDIAN AFFAIRS,
Washington, June 18, 1889.

Gen. Benjamin Simpson,
Selma, Alabama,

Hon. John H. Shupe,
Oakland, Oregon,

Napoleon B. Humphrey, Esq.,
Albany, Oregon.

Gentlemen:

The Secretary of the Interior having appointed you commissioners "to negotiate with the Coeur d'Alene tribe "of Indians for the purchase and release by said tribe of such "portions of its reservation, (in Idaho) not agricultural and "valuable chiefly for minerals and timber as such tribe shall "consent to sell" &c., authority for which is found in the 4th Section of the Indian Appropriation Act approved March 2, 1889 (25 Stat. 1002), and of which appointment you were severally notified by letters bearing date March 31, 1889, the following instructions are issued for your guidance in the duties devolving upon you under and by virtue of such appointment.

The following is the full text of the Section referred to:

That the Secretary of the Interior be, and he is hereby, authorized and directed to negotiate with the Coeur

d'Alene tribe of Indians for the purchase and release by said tribe of such portions of its reservation not agricultural and valuable chiefly for minerals and timber as such tribe shall consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians which purchase shall not be complete until ratified by Congress and for the purpose of such negotiation, the sum of two thousand dollars, or so much thereof as may be necessary, is hereby appropriated out of any money in the Treasury not otherwise appropriated; the action of the Secretary of the Interior hereunder to be reported to Congress at the earliest practicable time.

The reservation of the Coeur d'Alene tribe of Indians to which the Act relates is situated in the Northwestern portion of Idaho, between the 47th and 48th parallels of north latitude, and has for its western boundary the dividing line between Idaho and Washington Territory. It embraces an area of 598,500 acres, or 935 square miles.

The reservation was established for the Coeur d'Alene Indians by Executive Orders dated June 14, 1867 and November 8, 1873. – See pamphlet Executive Orders herewith p.p.323 to 325.

In a recent report by this office, to which more particular reference will shortly be made, the then Commissioner (Mr.Atkins) said:

In my opinion these Indians have all the original Indian rights in the soil they occupy. They claimed the country long before the lines of the reservation were defined by the Executive Order of 1873, and the present reservation embraces only a portion of the lands to which they laid claim. This claim has been recognized in various ways and at sundry times, and the last Congress (50th) authorized the Secretary of the Interior to negotiate with

them "for the cession of their lands outside the limits of the present Coeur d'Alene Reservation to the United States".

I will add here for your information that negotiations were conducted with the Coeur d'Alenes in pursuance of the authority above cited, resulting in an agreement most satisfactory to the Indians, but which has never been ratified by Congress. For the particulars of said agreement and history of the negotiations, see House Ex.Doc.No.63, 50th Cong.1st Sess., copy herewith, p.35 et seq.

No cession of any portion of the reservation was proposed in the negotiations then had. The Act simply authorized negotiations for the cession of lands "outside the limits of the present Coeur d'Alene reservation."

The present law, under which negotiations are now to be conducted, as we have already seen authorizes negotiations for the purchase and release by said tribe "of *such portions of its reservation*, not agricultural and valuable chiefly for minerals and timber as such tribe shall consent to sell."

That this office has been in sympathy with the general feeling of the whites in that section of the country that the Coeur d'Alene reservation should be reduced to some extent, in the interest of trade and commerce and public convenience, is shown from the report made by the office in response to a resolution of the Senate of the United States, of January 25, 1888, calling for certain information in respect of said reservation, and also as to whether it was advisable to release any of the navigable

waters therein referred to, from the limits of the reservation; which said report is published in Senate Ex.Doc.No.76, 50th Congress 1st Session, a copy of which is herewith enclosed.

Brief mention of this report was made in the first part of these instructions and I now desire to call your attention more particularly to it, as showing, in connection with the accompanying maps, the character of the lands embraced within the reservation as far as known to this office, where the agricultural, grazing, and mineral lands lie, the location and extent of its navigable waters, the position of the neighboring towns and mines, the steamboat route through Lake Coeur d'Alene and the Coeur d'Alene river, the wagon-roads and trails entering and crossing the reservation, mountain ranges, railroads, etc.

It is understood that all, or nearly all, of the Indians live in the southern portion of the reservation, – south of Lake Coeur d'Alene and St. Joseph river and not far from the old mission on Hangman's Creek:

They cultivate the soil extensively, have comfortable houses and are well supplied with agricultural implements of the most improved patterns, all of which they have acquired by their own unaided industry. They make but little if any use of the northern portion of their reservation, for the simple reason that the best agricultural lands are in the extreme southern portion of the reservation, and they are essentially an agricultural people. Hence the portion of the reservation they will be most likely to part with is the northern portion, the lands of which are believed to be chiefly valuable for minerals and timber, classes to which the act only applies, and the segregation of which would, presumably, be of most benefit to the public at large.

This office is not prepared to say just what particular portions of the reservation are subject to purchase under the Act, which as has just been observed, confines the negotiations to the purchase of lands "not agricultural and valuable chiefly for minerals and timber." That can best be determined by personal inspection by the commissioners and conference with the Indians.

Saltice and other prominent chiefs of the tribe have frequently expressed a willingness to sell some of the "mountain lands" within their reservation boundaries, but they appear to be very greatly disappointed on account of the failure of Congress thus far to ratify the agreement of March 26, 1887, which provides payment to the Indians for lands claimed by them outside of their present reservation, and in a recent communication to the President they expressed a strong disinclination to enter into a new agreement in advance of the ratification of the old one.

For your information I will state that the aforesaid agreement – of March 26, 1887, – was transmitted to Congress by the President on January 9, 1888, with a recommendation from this office for its speedy ratification in which recommendation the then Secretary of the Interior concurred – See House Ex.Doc.No.68 50th Congress 1st Session herewith – but it does not appear that any final action has been taken thereon by that body.

You will proceed without unnecessary delay to the Coeur d'Alene reservation, where the Agent who has charge of the reservation, Hal.J.Cole, Esq., will be instructed to meet you upon your notifying him of the date when you expect to arrive there. The Agent's post

office address is "Fort Spokane, Washington Territory." Telegrams should be addressed "Spokane Falls, Washington Territory."

You will hold open councils with the Indians to which all the male adults 18 years of age and upwards belonging to the reservation shall be invited.

The provision of law authorizing the negotiations should be carefully read and explained to the Indians, who should be made to clearly understand that any purchase you may negotiate with them will "not be complete until ratified by Congress." After which you will conduct the authorized negotiations, remembering that as the agents of the Government it is your duty to study and zealously guard the interests of the Indians looking to their future well-being and permanent prosperity, and in all your dealings with them, to advise them wisely and for their best good.

Great care should be taken in your interviews to secure proper and exact interpretations of the communications passing between you.

You will make a complete and accurate report of all your proceedings, and of the proceedings of every council held, including all that is said or done by any person present, and the same must be certified by your signatures as correct and submitted with your final report.

In addition to the original written proceedings and report of the commission, you will prepare and submit two copies of each in order that the same may be in condition to submit to Congress.

Any agreement effected, should be carefully drawn and executed by not less then three-fourths of all the adult male members of the tribe occupying the reservation.

You are authorized to employ such interpreters and clerical assistants, and to incur such other proper expense as may be necessary to the faithful discharge of the duties devolving upon you, strictly observing, however, to make no expenditure in excess of the appropriation of two thousand dollars ($2,000), provided by the Act.

For your guide in the preparation of an agreement, especially with reference to signatures, seals, attestation of witness, certificate of interpreters etc., see agreement with certain Indians in Montana, ratified by Act of May 1, 1888 (Public No.78), copy herewith.

Very respectfully,

/s/ [Illegible]
Acting Commissioner.

(Larrabee)

EXHIBIT 250

THE

EXECUTIVE DOCUMENTS

OF THE

HOUSE OF REPRESENTATIVES

FOR THE

FIRST SESSION OF THE FIFTY-FIRST CONGRESS.

1889-'90.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1890.

REPORT
OF THE
COMMISSIONER OF INDIAN AFFAIRS.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, October 1, 1889.

SIR: The fifty-eighth annual report of the Commissioner of Indian Affairs is respectfully submitted.

I entered upon the discharge of the duties of this office July 1, 1889. I have had no time as yet to familiarize myself fully with the details of office administration nor to make myself acquainted by personal observation with the practical workings of the Indian field service. As soon as practicable, I hope to do both.

Unexpectedly called to this responsible position, I entered upon the discharge of its duties with a few simple, well-defined, and strongly-cherished convictions:

First. – The anomalous position heretofore occupied by the Indians in this country can not much longer be maintained. The reservation system belongs to a "vanishing state of things" and must soon cease to exist.

Second. – The logic of events demands the absorption of the Indians into our national life, not as Indians, but as American citizens.

Third. – As soon as a wise conservatism will warrant it, the relations of the Indians to the Government must rest solely upon the full recognition of their individuality. Each Indian must be treated as a man, be allowed a man's rights and privileges, and be held to the performance of a man's obligations. Each Indian is entitled to his proper share of the inherited wealth of the tribe, and to the protection of the courts in his "life, liberty, and pursuit of happiness." He is not entitled to be supported in idleness.

Fourth. – The Indians must conform to "the white man's ways," peaceably if they will, forcibly if they must. They must adjust themselves to their environment, and conform their mode of living substantially to our civilization. This civilization may not be the best possible, but it is the best the Indians can get. They can not escape it, and must either conform to it or be crushed by it.

* * *

Negotiations with the Pottawatomie and Kickapoo Indians in Kansas. – By section 3 of the Indian appropriation act of March 2, 1889 (25 Stat., 1002), the sum of $5,000 was appropriated "to enable the President to negotiate with the Prairie land of Pottawatomies and the Kickapoo Indians for the sale of a portion of their lands in Kansas and the allotment of the remainder in severalty; such agreements as may be made to be submitted by the President to Congress at the next session."

In pursuance of this provision, the President on April 26, 1889, appointed Benjamin J. Horton, of Lawrence, Kans., A. D. Walker, of Horton, Kans., and H. J. Aten, of Hiawatha, Kans., commissioners to negotiate with said Indians for the purpose therein specified. Instructions for their guidance in the discharge of the duties before them, prepared in this office, and approved by the Department May 9, 1889, were duly transmitted.

A preliminary report received from said commissioners shows that the efforts so far made by them to effect the negotiations contemplated by the law under which they are appointed have not been successful. The Indians, it is said, are influenced against taking allotments by the condition, example, and persuasion of about 250 members of what is known as the citizen class of Pottawatomie Indians who some years ago took their lands in severalty, without restriction as to alienation, and received their portion of annuities, and are now without land or money, living on the charity of their friends on the reservation, where they have no rights. These pauper quasi-citizen Indians are entitled under existing laws to take allotments on the Pottawatomie Reservation in the Indian Territory, and for their own welfare, as well as for

the good of the Indians among whom they are now living without present or future prospects for improvement of their condition, they should be removed to the Indian Territory, and be required to take allotments and work for self support. This may be necessary to secure the consent of the Pottawatomie and Kickapoo Indians in Kansas to the measures contemplated in the law above referred to.

The question of making allotment under the provisions of the general allotment act to such of the members of these two tribes as desire them was submitted to the Department by this office on September 13, 1889.

Sioux in Dakota. – By section 29 of an act approved March 2, 1889 (25 Stat., 859), "to divide a portion of the reservation of the Sioux Nation of Indians in Dakota into separate reservations, and to secure the relinquishment of the Indian title to the remainder, and for other purposes," it is provided –

That there is hereby appropriated, out of the money in the Treasury not otherwise appropriated, the sum of twenty-five thousand dollars, or so much thereof as may be necessary, which sum shall be expended, under the direction of the Secretary of the Interior, for procuring the assent of the Sioux Indians to this act provided in section 27.

The last clause of section 3 of the Indian appropriation act of March 2, 1889 (25 Stat., 1002), reads as follows:

The President of the Untied States is hereby authorized and empowered to appoint three commissioners for the purpose of entering into negotiations and agreements with the Sioux Indians occupying the Great Sioux Reservation in Dakota for a full and complete cession and

relinquishment to the United States of a portion of their reservation, and to divide the remainder into separate reservations, and such agreements, when made, to be by them submitted in the first session Fifty-first Congress for ratification, and to carry out this provision the sum of twenty-five thousand dollars, or as much thereof as may be found necessary, to be expended under the direction of the Secretary of the Interior, is hereby appropriated, this amount to be immediately available: *Provided*, That the pay of such commissioners shall not exceed ten dollars per day, exclusive of traveling expenses.

Under this latter provision of law, Hon. Charles Foster, of Fostoria, Ohio, Hon. William Warner, of Kansas City, Mo., and Maj. Gen. George Crook, U. S. Army, were appointed by the President a commission to negotiate with the Sioux for the purpose therein provided.

The instructions for this commission were prepared in this Office, and, after they had been approved by the Secretary of the Interior, were transmitted to the said commission, which entered upon its duties in the latter part of May last.

The commissioners have been successful in negotiating an agreement whereby the Indians relinquish their title to a large portion of the great Sioux Reservation, but the report of the result of their labors has not been received in this office.

Coeur d'Alene Reservation. – The fourth section of the Indian appropriation act of March 2, 1889 (25 Stat., 1002), provides as follows:

That the Secretary of the Interior be, and he is hereby, authorized and directed to negotiate with the Coeur d'Alene tribe of Indians for the purchase and release by

said tribe of such portions of its reservation not agricultural, and vainable chiefly for minerals and timber, as such tribe shall consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and for the purpose of such negotiation the sum of two thousand dollars, or so much thereof as may be necessary, is hereby appropriated out of any money in the Treasury not otherwise appropriated, the action of the Secretary of the Interior hereunder to be reported to Congress at the earliest practicable time.

The Secretary, by letter of May 31, 1889, appointed Gen. Benjamin Simpson, of Selma, Ala., Hon. John H. Shupe, of Oakland, Oreg., and Napoleon B. Humphrey, esq. of Albany, Oreg., a commission to conduct the negotiations with the Coeur d'Alene Indians in accordance with the provisions of said act. Instructions were transmitted to the commission July 3, 1889.

Councils with the Indians were held in August last and as a result of the negotiations an agreement was concluded on the 9th day of September following, whereby the Indians agreed to sell a considerable portion of their reservation (in the northern part), valuable chiefly for minerals and timber, and embracing by far the greater portion of the navigable waters of the reservation. The terms agreed upon are regarded by the commissioners as reasonable and just alike to the Indians and the Government.

The agreement and the report of the commission will be submitted to the Department at an early day for transmittal to Congress.

Indian Territory. – In accordance with the provisions of section 14 of the Indian appropriation act of March 2, 1889 (25 Stat., 1005), Hon. Lucius Fairchild, Hon. J. F. Hartranft, and A. H. Wilson, esq., were appointed by the President a commission to "negotiate with the Cherokee Indians, and with all other Indians owning or claiming lands lying west of the ninety-sixth degree of longitude in the Indian Territory, for the cession to the United States of all their title, claim, or interest of every kind or character in and to said lands."

Upon the receipt of its instructions this commission proceeded to the Indian Territory, and in a letter of August 2, 1889, to Hon. J. B. Mayes, principal chief Cherokee Nation, submitted the proposition authorized by the act "that the said nation shall cede to the United States, in the manner and with the effect aforesaid, all the rights of said nation" in the lands of that nation lying west of the ninety-sixth degree of longitude in the Indian Territory, and known as the Cherokee Outlet "upon the same terms as to payment as is provided in the agreement made with the Creek Indians, of date January 19, 1889." The commission so tendered $1.25 per acre to the said nation for all the lands embraced in the said "Cherokee Outlet," the sums heretofore paid by the United States to be deducted from the total amount found to be due therefore at the rate aforesaid.

Mr. Mayes, by letter of August 12, 1889, replying to this proposition, declined to convene the Cherokee Council in special session, for the reason, as stated by him, that such action could not facilitate the matter, as he claims that the constitution of the Cherokee Nation will have to

be amended before any proposition to sell any part of the Cherokee country can be entertained.

Copy of the correspondence between the commission and Mr. Mayes has been filed, and the said commission has suspended negotiations until such time as the Cherokee Council shall have convened in regular session, when negotiations will be resumed.

Red Pipestone Reservation in Minnesota. – The act of March 2, 1889 (25 Stat., 1012), entitled "An act for the disposition of the agricultural lands embraced within the limits of the Pipestone Indian Reservation in Minnesota," directed the Secretary of the Interior to appoint three discreet persons, at least one of whom shall be a resident and freeholder in the State of Minnesota, to appraise the actual value of the agricultural lands in said reservation (save and except the SW, of Sec. 1, in T. 106 N., of R.46 W.); also to appraise the actual value of the strip of land 100 feet in width over and across said reservation occupied by the Cedar Rapids, Iowa Falls and Northwestern Railway Company, as well as the damage done to other lands of said reservation by reason of the taking and occupying of said strip for railroad purposes; the appraisals to be made with a view to the entry and sale of such tracts as the Yankton Indians might consent to relinquish,

Messrs. S. H. Nichols, Robert Scarf, and T. C. Smallwood were appointed commissioners to make the required appraisement, and on May 11, 1889, they submitted their report, which was transmitted to the Department June 20, 1889.

Under the provisions of section 3 of said act Messrs. G. W. Parker, United States Special Indian Agent, Frank W. Rawles, and Samuel T. Leavy, United States Indian Agent in charge of the Yankton Agency, were designated for the purpose of securing the consent of a majority of the male adults of the Yankton tribe of Dakota or Sioux Indians to the proposed sale of the lands and right of way. Under date of August 1, 1889, the commissioners submitted their report, from which it appears that the Indians determined not to assent to the provisions of the act for the sale of any portion of the reservation, except the right of way for the railroad.

This action is not a surprise to this office. The Red Pipestone Reservation was established under the eighth article of the treaty between the United States and the Yankton tribe of Sioux or Dakota Indians, concluded April 19, 1858 (11 Stat., 743), which provided that said –

Yankton Indians shall be secured in the free and unrestricted use of the Red Pipestone quarry, or so much thereof as they have been accustomed to frequent and use for the purpose of procuring stone for pipes; and the United States hereby stipulates and agrees to cause to be surveyed and marked as much thereof as may be necessary and proper for that purpose, and retain the same and keep it open and free to the Indians to visit and procure stone for pipes so long as they shall desire.

The reservation (1 mile square) was surveyed in August, 1859. Subsequently in the survey of the townships in which it was included, the lines were extended across the reservation without respecting it. Through this error a patent was inadvertently issued to one August Clausen, May 15, 1874. Suit was subsequently brought in

the United States circuit court to vacate said patent. The defendants demurred to the bill for want of equity; the demurrer was sustained and the bill dismissed at the June term, 1880. The suit was carried to the Supreme Court on appeal, and at the October term, 1884, the decree was reversed, with directions to overrule the demurrer, the defendants to have leave to answer. (111 U.S., 347.) The opinion, however, virtually covered the merits of the case and established the legal character of the reservation.

Other entries were made on the reservation but were canceled, and various applications have been rejected. In October 1887, certain parties who had been residing upon the reservation, and had made improvements thereon, were removed with the aid of the military, under

* * *

EXHIBIT 215

SENATE.

51ST CONGRESS, *1st Session.*

EX. DOC. *No.* 14.

MESSAGE

FROM THE

PRESIDENT OF THE UNITED STATES,

TRANSMITTING

A letter of the Secretary of the Interior relative to the purchase of a part of the Coeur d'Alene Reservation

DECEMBER 18, 1889. – Read, referred to the committee on Indian Affairs, and ordered to be printed.

To the Senate and House of Representatives:

I transmit herewith a communication of 16th instant from the Secretary of the Interior, submitting the report, with accompanying papers of the Commission appointed under the provisions of the act of March 2, 1889 (25 Stats., 1002), to conduct negotiations with the Coeur d'Alene tribe of Indians, for the purchase and release by said tribe of such portions of its reservation not agricultural, and valuable chiefly for minerals and timber, as such tribe shall consent to sell, etc., together with the agreement entered into by said Commission September 9, 1889, with said Indians.

BENJ. HARRISON.

EXECUTIVE MANSION,
December 18, 1889.

DEPARTMENT OF THE INTERIOR,
Washington, December 16, 1889.

The PRESIDENT:

I have the honor to submit herewith a report, with the accompanying papers, of the commission appointed in pursuance of the act of March 2, 1889, making appropriations for the current and contingent expenses of the Indian Department (25 Stats., 1002), to negotiate with the Coeur d'Alene tribe of Indians for the purchase and release by said tribe of such portions of its reservation not agricultural, and valuable chiefly for minerals and timber, as such tribe shall consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress.

In this report the area of the ceded territory is estimated at 184,960 acres, or 289 square miles, and the consideration agreed upon is the sum of $500,000, to be paid to the said Indians "pro rata, or share and share alike for each and every member of said tribe as recognized by said tribe now living upon said reservation," upon condition that the agreement of March 26, 1887, with said Indians, now before Congress (see House Ex. Doc. 63, Fiftieth Congress, first session, p. 53), shall be duly ratified by Congress.

The commissioners, in presenting this agreement, say:

In consideration of the fact that there is but very little agricultural land in the territory negotiated for, that it is the universal desire of the inhabitants of the Northwest

that this land be opened to public domain, the great demand and the scarcity of timber adjacent to this section of the country, the prospects of vast mineral wealth which would be of great benefit to capital seeking investment, and the small value this land is to the Indians, the commissioners deem the bargain an excellent one, the price very reasonable, much lower than could have been expected, and hope that in this purchase you will realize, as they do, the importance of this land being made useful to the governing States and Territories.

The Commissioner of Indian Affairs in his report herewith reviews the provisions of the agreement and refers to previous reports showing the character and condition of these Indians.

It is believed that this agreement is the best that can be made, and it is submitted with the recommendation that it be transmitted to Congress for such action as may be deemed proper.

I have caused two maps to be prepared for the information of Congress, showing the Coeur d'Alene Reservation and the lands therein ceded by this agreement.

I have the honor to be, very respectfully, your obedient servant.

JOHN W. NOBLE,
Secretary.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, DECEMBER 7, 1889

SIR: The fourth section of the act making appropriations for the current and contingent expenses of the

Indian Department, etc., approved March 2, 1889 (25 Stats., 1002), provides as follows:

That the Secretary of the Interior be, and he is hereby, authorized and directed to negotiate with the Coeur d'Alene tribe of Indians for the purchase and release by said tribe of such portions of its reservation not agricultural, and valuable chiefly for minerals and timber, as such tribe shall consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and for the purpose of such negotiation the sum of $2,000, or so much thereof as may be necessary, is hereby appropriated out of any money in the Treasury not otherwise appropriated; the action of the Secretary of the Interior hereunder to be reported to Congress at the earliest practicable time.

In pursuance of this provision a commission, composed of Hon. Benjamin Simpson, of Selma, Ala., Hon. John H. Shupe, of Oakland, Oregon, and Napoleon B. Humphrey, esq., of Albany, Oregon, was appointed in May last, and under instructions of June 13, 1889, proceeded to the Coeur d'Alene Reservation in the discharge of its duties, arriving there on the 5th of August following.

The commissioners report that they held frequent councils with the Indians, explored the mineral portions of the reservation lying in the northern part thereof, and finally, on September 9, 1889, concluded an agreement with the Indians whereby they cede and relinquish to the United States a very considerable portion of their reservation, valuable chiefly for minerals and timber, upon terms advantageous as they believe both to the Indians and the

Government. The area of the ceded territory is estimated at 184,960 acres, or 289 square miles.

I have the honor to herewith submit the final report of the commission (dated September___, 1888), the agreement entered into with the Indians, and the minutes, or more properly the reports, of the several councils held with them.

The cessation is described in the first article of the agreement as follows:

Beginning at the northeast corner of the said reservation, thence running along the northern boundary line north sixty-seven degrees twenty-nine minutes; west to the head of the Spokane River to the northwest boundary corner of the said reservation; thence south along the Washington Territory line 12 miles; thence due east to the west shore of the Coeur d'Alene Lake; thence southerly along the west shore of said lake to a point due west of the mouth of the Coeur d'Alene River, where it empties into the said lake; thence in a due east line until it intersects with the eastern boundary of said reservation; thence northerly along the said eastern boundary line to the place of beginning.

The principal consideration agreed upon is found in the second article, which reads as follows:

And it is further agreed in consideration of the above, that the United States will pay to the said tribe of Coeur d'Alene Indians the sum of $500,000, the same to be paid to the said tribe of Coeur d'Alene Indians upon the completion of all the provisions of this agreement.

Article 3 prescribes the manner of payment as follows:

It is further agreed that the payment of the money aforesaid shall be made to the said tribe of Indians pro rata, or share and share alike for each and every member of the said tribe as recognized by said tribe now living upon said reservation.

It would appear from the language of the two articles together that the money is to be paid to the Indians per capita, cash in hand.

As, according to the last census, the tribe numbers five hundred and twenty men, women and children, each would receive about $960 of the consideration named.

A further and in itself important stipulation and consideration is found in the fourth article, as follows:

It is further agreed and understood that this agreement shall not be binding upon either party until the former agreement now existing between the United States by the duly appointed commissioners and the said Coeur d'Alene tribe of Indians, bearing date of March 26, 1887, shall be duly ratified by Congress, and in the event of the ratification of the aforesaid agreement of March 26, 1887, to be and remain in full force and effect, but not binding upon either party until ratified by Congress.

The agreement of March 26, 1887, to which reference is meant, was made in pursuance of authority contained in the Indian appropriation act, approved May 15, 1886 (24 Stats., 44), and was submitted to Congress, by the President, January 9, 1888.

The Coeur d'Alene Indians laid claim to a vast area of country outside of their present reservation, including the site of the present flourishing city of Spokane Falls and other now populous communities.

Their claim was based upon original possession and occupancy.

A full history of the case, and the agreement itself, may be found in House Ex. Doc. No. 63, Fiftieth Congress, first session, two copies herewith.

When the Commissioners whose work is now under consideration approached the Indians upon the subject of relinquishment of some of their reservation lands, they absolutely refused to entertain any proposition of that kind until the old agreement was ratified.

Finally, however, after much argument and entreaty they consented to relinquish the lands the Government proposed to purchase, and the price named ($500,000), upon the express condition that the old agreement should be ratified and carried into effect; and accordingly a provision for the ratification of said agreement was inserted in the agreement. (Article 4.)

In reporting upon this point the Commissioners say:

The Commissioners were made aware of the stern fact that they were contending with obstacles that threatened to overthrow all business plans they had formed, and presented formidable barriers to the consummation of a treaty. The Indians, while kind and courteous, were reluctant upon business propositions from the fact that other business transactions with them had been neglected; and the failure of Congress to ratify the last treaty, together with the dilatory manner of the railroad company in making payment for right of way, were weapons they used against overtures of the Commissioners for the purchase of any more land. They displayed surprising business sagacity, coupled with an exalted

idea of the fulfillment of promises. Much time was consumed in appeasing the grievances they fostered, and in establishing confidence with them. They finally consented to dispose of a portion of the land that is included in this treaty, they insisting upon making the lines. The exorbitant price asked, and the small amount of land offered, precluded any bargain, and thus matters stood for two councils following.

After they had been shown the benefits to accrue from the sale of these lands, and the assurance by the Commission of the ratification of the former treaty – a clause being inserted bearing upon the fulfillment of the provisions of the former treaty – the sale was consummated and the agreement signed accompanying this report.

In consideration of the fact that there is but very little agricultural land in the territory negotiated for, that it is the universal desire of the inhabitants of the entire Northwest that this land be opened to public domain, the great demand and the scarcity of timber adjacent to this section of the country, the prospects of vast mineral wealth which would be of great benefit to capital seeking investment, and the small value this land is to the Indians, the Commissioners deem the bargain an excellent one, the price very reasonable – much lower than could have been expected – and hope that in this purchase you will realize, as they do, the importance of this land being made useful to the growing States and Territories.

It will be proper to state here that it would cost the Government, in money, only $150,000 (Art. 6) and the annual salary of three employees, physician, blacksmith, and carpenter, and the cost of needed medicines (Art. 12) to carry out the provisions of the old agreement, the ratification of which has been heretofore recommended by this office in submitting it to the Department for

presentation to Congress; and a bill for that purpose passed the Senate September 20, 1888 (Cong. Record, vol. 19, part 9, p. 8755), but did not reach final action in the House, where it was referred to the Committee on Indian Affairs, September 24, 1888 (*ib.* p. 8893).

This office has no data or information other than that furnished by the Commissioners themselves as to the value of the lands the Indians agree to cede and relinquish to the United States by the terms of the present agreement.

It has not been the practice to pay such large sums of money to Indians cash in hand as is proposed in this case, but the Coeur d'Alene Indians are far advanced in civilization, and from what is known of their habits and past life it would not be unreasonable to assume that they would make just as good use of their money if paid in this way as they would if it were paid to them in smaller sums or expended for their benefit in the usual manner.

As showing the character and condition of these people, I quote the following from a recent report by this office (February 7, 1888), in response to a resolution of the Senate calling for certain information in respect of their reservation, etc.:

There are few Indians in the entire country, if we except the five civilized tribes, who are as far advanced, and even they need not be excepted in any comparison either of their virtues, habits of industry, loyalty, or ambition to attain a higher stage of civilization.

They cultivate the soil extensively, live in comfortable houses, dress like the whites, wear short hair, and in all other respects live and do as white people do. Their houses are painted inside and outside, their barns are

well built and commodious, and they have all the improved farm implements and machinery. They own large bands of cattle and horses, and abundance of hogs and poultry.

The Northwest Indian Commission, in the report of its recent visit to these Indians, said:

"Each one has a comfortable house on his farm, and nearly all have equally comfortable houses at the mission, which together make quite a village. They remain on their farms during the week days, and on the Sabbath repair to their dwellings at the village to attend religious services and see their children who are at the mission schools. * * * Long experience in self-reliance and traffic with the neighboring whites has made them cautious, shrewd, and provident in the use of money. We learned that their trade in one town adjacent to the reservation amounts to about $25,000 yearly. * * * A better ordered and better behaved Indian community can nowhere be found."

Furthermore, the Coeur d'Alene Indians have been for many years the firm friends of the whites. A notable instance of this was the part they took in the memorable Nez Percé outbreak of 1878. They not only shielded and protected the whites in that disastrous war to the fullest extent of their power, but guarded their property at the peril of their own lives, when a large portion of the white population had fled the country for safety.

When peace was restored the people acknowledged their good services and thanked them in formal terms, promising also to assist them in obtaining permanent title to their homes.

I have said this much in order to show that the Coeur d'Alene Indians are quite intelligent and fully capable of understanding their relations to their white neighbors, and that they would be likely to take a sensible view of

any proposition for a change of the boundaries of their reservation which public necessity or convenience would seem to require, and at the same time to show that they are deserving of fair and honest treatment from the whites.

The one thing that has given them trouble has been the fear of losing their homes.

They have watched the progress of white settlement in the surrounding country, the discovery of valuable mines, the building of railroads, etc., and all this has made them apprehensive lest in some way their reservation might be wrested from them.

The report of the Commission, the agreement, and council proceedings, with two copies of each, furnished by the Commission, are respectfully submitted for your action and transmittal to Congress as the act requires.

Very respectfully, your obedient servant,

T.J. MORGAN,
Commissioner.

The SECRETARY OF THE INTERIOR.

(Original.)

Report of Coeur d'Alene Indian Commission, appointed March 2, 1889 (Stat., 1002).

OFFICE OF COEUR D'ALENE INDIAN COMMISSION,
Portland, Oregon, September, 1889.

SIR: The Commission appointed under authority of the act of Congress approved March 2, 1889 (Indian appropriation act), to negotiate with the Coeur d'Alene tribe of Indians for a portion of their reservation, valued chiefly for its timber and mineral, have the honor to submit the following report of their negotiations with the

said Coeur d'Alene Indians, to accompany an agreement entered into with them for a portion of said reservation, as contemplated by said act:

The Commission arrived in Portland, Oregon, from their respective homes, August 1, met on the 2d, and effected organization on the 3d, secured clerical assistance and proceeded to De Smet Mission, Coeur d'Alene Indian Reservation, August 5. Notification of the commissioners' arrival was sent Agent Hal. J. Cole, and he met with them in the first council held with the Indians on August 14, at which meeting the business of the commissioners was made known to the Indians and the provisions governing negotiations carefully explained.

Permission was asked for the privilege of examining the lands sought, which was granted by the chief, who appointed two guides to accompany the Commission on their tour of inspection of the lands mentioned in the instructions.

The Commission proceeded August 16 overland from the southern boundary of the reservation northward to the confluence of the St. Joseph River with Lake Coeur d'Alene, passing in their journey over the rich agricultural land and the many well-cultivated farms of the Indians lying in that portion of their territory. It was with much surprise and pleasure that the Commission noted the great progress made by these Indians in the ways of civilization and the arts of peace. Farms surrounded by better fences than their neighbors, the whites, burdened with golden grain that gave promise of a rich harvest; horses and cattle in large numbers peacefully grazing upon hills covered with bunch-grass, made a picture truly pleasant to contemplate.

The greater portion of the land between the southern boundary and the St. Joseph River is susceptible of cultivation. From the St. Joseph River the Commission proceeded by boat to the Old Mission, the extreme northeastern point of the reserve, traversing in their course some eight miles of Coeur d'Alene Lake and thirty miles of Coeur d'Alene River. From the Old Mission journeys were made to the interior of the adjacent country, prospecting for mineral deposits, and inspecting the growth and quality of the timber which grows abundantly upon the greater portion of the rugged mountains. Many indications of mineral were found, and the timber in places was of excellent quality, consisting of fir, yellow and white pine, cedar, and tamarack. After three days' exploration the Commission proceeded to Coeur d'Alene City, thence to the great mineral belt of the Wolf Lodge country. Portions of the timber was found to be very good, while some situated along rocky points and the steep sides of the mountains was scrubby and of little use. The mineral features of this locality give promise of rich deposits of gold, silver, and lead, equal, if not rivaling, the developed mines of Coeur d'Alene.

Returning to Coeur d'Alene City, the Commission made an inspection of the country situated west of the lake and along the Spokane River, being that part of the reserve lying in the extreme northwest. This is the section that will prove most valuable to the whites for timber at the present time. The timber is good and is easy of access, the Spokane River furnishing good facilities for conveying the logs to points along its course, where the opening of a new and rapidly settling country causes a great demand for lumber. After a thorough inspection of the northern half of the reservation, the Commission returned to headquarters and called a council on August 27.

At this council the commissioners were made aware of the stern fact that they were contending with obstacles that threatened to overthrow all business plans they had formed, and presented formidable barriers to the consummation of a treaty. The Indians, while kind and courteous, were reluctant upon business propositions, from the fact that other business transactions with them had been neglected, and the failure of Congress to ratify the last treaty, together with the dilatory manner of the railroad company in making payment for right of way, were weapons they used against overtures of the commissioners for the purchase of any more land. They displayed surprising business sagacity, coupled with an exalted idea of the fulfillment of promises.

Much time was consumed in appeasing the grievances they fostered, and in establishing confidence with them. They finally consented to dispose of a portion of the land that is included in this treaty, they insisting upon making the lines. The exorbitant price asked and the small amount of land offered precluded any bargain, and thus matters stood for two councils following. After they had been shown the benefits to accrue from the sale of these lands, and assurance by the Commission of the ratification of the former treaty, a clause being inserted bearing upon the fulfillment of the provisions of the former treaty, the sale was consummated, and the agreement signed accompanying this report.

In consideration of the fact that there is but very little agricultural land in the Territory negotiated for; that it is the universal desire of the inhabitants of the entire Northwest that this land be opened as public domain; the great demand and scarcity of timber adjacent to this section of the country; the prospects of vast mineral wealth, which would be of great benefit to capital seeking mining investment, and the small value this land is to the Indians, the commissioners deem the bargain an excellent

one, the price very reasonable – much lower than could have been expected – and hope that in this purchase you will realize, as they do, the importance of this land being made useful to the growing States and Territories.

In conclusion, we wish to mention the fact of the uniform kindness and courtesy extended to us by the chiefs and head men of the tribe during the whole time of our stay among them and the several councils held with them, and especially do we feel under deep and lasting obligations to Rev. Father Cornano and the United States interpreter, Mr. Stephen E. Liberty, for the careful and correct manner in which they conducted the interpretations and their efforts to bring about an amicable and satisfactory settlement.

With the hope that what our labors have accomplished will be satisfactory and acceptable to yourself and that Congress will deem it advisable to ratify what has been done, we are,

Very respectfully, your obedient servants,

BENJAMIN SIMPSON.
JOHN H. SHUPE.
NAPOLEON B. HUMPHREY.

First council with Coeur d'Alene Indians, held at De Smet Mission, Wednesday, August 14, 1889.

The council met and was opened with prayer by Rev. Father Camano. Present: Commissioners General Ben. Simpson, J. H. Shupe, and N. B. Humphrey, the chiefs, headmen, and male adults of the Coeur d'Alene tribe of Indians, and their interpreter.

General SIMPSON said: Friends, I am glad to meet you here to-day, pleased to see so many in attendance. I will state our mission here. We have been sent here by the Government at Washington to purchase a portion of the northern part of your reservation. We read to you our instructions from Washington. [Instructions from Secretary of Interior read.] We come to you in good faith and honest purpose. It is not our intention to do anything but what is satisfactory to you, and will protect your rights as well as those of the Government. We, as commissioners, will treat you fairly. It is not our intention to go into details regarding this question until after we have visited the lands and know the price you fix upon them. You are not compelled to sell.

I learned before I left Washington of the failure of Congress to ratify the treaty made with you two years ago for your outside lands; I am satisfied that it will be ratified by the next Congress. The reason of its not being ratified before was want of time. To make this treaty in all its force and vitality, we will insert a clause to the effect that unless the other treaty (of 1887) is ratified, this shall become null and void.

I wish to speak to you now regarding the money due you from the railroad company for right of way through your reservation. Your agent, Mr. Cole, has received instructions and authority to pay it at once. [Instructions to Agent Cole read.]

SALTISE (head chief). Your talk pleases me, and I am pleased in the talk from Washington. You have come; I know it now; all my Indians and I understood you were to come. I wish to tell you my last will – the treaty of

1887. We built a strong, high fence with the Government; we built it round so the ends nearly met. We done our part, but the gap that was left has never been finished by the Government at Washington. Now, you three friends and headmen must close up that gap. I am afraid, my friends, of that treaty. I am doubtful. If I was not doubtful there would not be hard work of this. That treaty is a wall we can not see through. When it is down we can see through and talk.

General SIMPSON. What you say is good sense. I regret that it has not been done, but it is no fault of the Government; the reason it has not been ratified is, because they have had no time to reach it. The treaty has been, indorsed by the President and Secretary of the Interior, and will be ratified this winter. The treaty we make now will be null and void unless the other treaty is ratified; both treaties can be ratified at the same time; the same Congress that is to ratify that treaty sent us here to negotiate this treaty with you, and it would be a great folly and child's-play to do so if they did not intend to ratify the other treaty of two years ago.

SALTISE. We are Indians and need your sympathy and advice. We can neither read nor write and can not understand like you, but we are thankful for what you have done. What we talk about will be all right if you sanction what I say. Do not be tired or wearied. We would like for you to have a paper and we want a paper, too. After this you may speak what you want and after you are through I will talk again.

General SIMPSON. I understand what you say. We will not get weary. We want to deal justly and right with you.

We will go and examine the land and locate it, then make a paper and agree together. You can have a friend or legal gentleman look over the agreement and see if it is all right; we intend to treat you fairly, and will do nothing but what is just between man and man.

SALTISE. After you go and look over the land and come back we will talk about trading, but do not see how we can trade here, or without sanction of the President. We would like to have some one in Washington to look after the matter.

General SIMPSON. After the agreement is made we are willing and will try to arrange so you can go to Washington and look after this business yourself. We do not wish to do anything but what is right.

SALTISE. I think it is better for you to go and see the land and put a price on it; then we can talk better about it.

The tribe then selected one of their number to accompany the commission as guide. A subchief by the name of Luke was chosen.

Council then adjourned to meet again after the land had been examined.

Second council.

DE SMET MISSION, *August* 27, 1889.

Present: Commissioners General Ben. Simpson, J. H. Shupe, and N. B. Humphrey, chiefs and headmen of the tribe of Coeur d'Alene Indians, and their interpreter.

General SIMPSON said: My friends, I am glad to see so many of you present to-day. We have been over and looked at the land spoken of at our last meeting. We desired to make a careful personal inspection of the northern portion of your reservation – the portion we desired to purchase of you – so that no injustice would be done you. Our object was to select the land that is of no benefit to you, but which may be of some use to the whites. Our instructions from Washington were to examine the timber and mineral lands that would be of no advantage to you.

The time is come when you, like the whites, should depend upon the cultivation of the soil. You have progressed astonishingly. When we look on your broad acres now in cultivation we are astonished and gratified. We know that the cultivation of the soil is the very foundation of civilization, prosperity, and wealth. We are children of one great Father – God: the only difference is, your skin is red and ours is white. Your Great Father at Washington, the President, is our father, too; his object is to treat all justly, and it is now thought that there is a portion of your reservation that is of no use to you, but may be to the whites: therefore we have been sent here to purchase that portion of you and pay you a reasonable price for it. As agents of the Government we buy it just like buying a horse – we look at the horse and try him, and make up our minds what he is worth to us; if you were buying you would ask the owner what he would take for him, and put him down to the lowest price in dollars and cents. The price the Government sells farming land for its $1.25 per acre. Mining land is a different thing: the Government does not sell it, but allows parties

to go onto the land and develop the mines. I want you to understand this matter just as it it [sic]. The timber lands, when sold as such, bring $2.50 per acre.

We inspected the land we expected to buy of you, and we found a portion of it mountainous and broken, with very poor timber: some parts of the country contain fairly good timber. We found some prospects of gold and silver, but are not prepared to say what their value is until developed. I will not talk any more until after we have heard what you have to say.

SALTISE. The chief talks nice; I like the way he talks. You are white, and I am only an Indian. Two years ago three commissioners came here and made a treaty with us. After we get through with that treaty we will talk of an agreement about the mineral land. Just as you said of a man who wants to buy a horse of another man, and the owner asks $25 for the horse, and the man wants to pay only $20; they can't agree; and it is just so with us.

General SIMPSON. I am very glad to hear the high chief of the Coeur d'Alene talk with so much sense and reason; am pleased with his talk; he is right in regard to buying a horse; of course if we are not willing to pay a man what he asks for his horse, then there is no trade. In regard to what you say about the former treaty, I desire to say this: If we make a treaty with you now, we will make it entirely dependent on the ratification of the former treaty; the head chief can have a copy of the agreement and treaty, and go to Washington to see that all is fulfilled and the treaty is ratified as agreed upon.

SALTISE. What was done by the last commission is like cooking a dinner, then setting it to one side to wait; you

do not cook a dinner and lay it aside, then cook another dinner before you have eaten the first; it is that way with these treaties.

General SIMPSON. I want to say this in regard to that former treaty: As I said before, the object of making this treaty now is that we are here and have spent a good deal of money already, and we want to make this treaty now, so when the other treaty is taken up this can be acted upon at the same time. The treaty of two years ago has not been ratified for want of time; there is no objection to it, and it will be ratified when Congress meets.

SALTISE. Congress is a great body, and has much power; it has a great deal to do. We don't amount to any more with them than a lot of coyotes, and anything we do they do not care about. We are honest, and we think you are.

General SIMPSON. The other treaty is half ratified now; the President and Secretary of the Interior have indorsed it, and Congress will take it up when it meets and finish it.

SALTISE. Don't let this be discouraging to you, what we say about these timber and mineral lands at this time.

General SIMPSON. When we talked before we proposed that, unless the other treaty was ratified, this would be null and void. We have looked at the land, and would like to know now what you will take for it, if the other treaty is ratified.

SALTISE. Where will you make the lines?

General SIMPSON. We fixed a line, as was shown you on the map; it is just as Mr. Liberty explained it to you.

You understand that the lake belongs to you as well as to the whites – to all, every one who wants to travel on it.

SALTISE. That is your idea about the boundary. You know we do not understand papers; in taking it that way we will not know the boundaries.

General SIMPSON. You all know where the St. Joseph River is. We do not want any of that. I will explain the boundaries: Commencing at the northeast corner of the Coeur d'Alene Reservation, thence along the northern boundary line of the reservation to the northwest corner; thence south along the division line between Washington and Idaho Territories to a point 12 miles south of the said northwest corner; thence due east to the west margin of the Coeur d'Alene Lake; thence southerly along the west shore of said lake to a point due west of the point at the mouth of the Coeur d'Alene River; thence due east across said lake to said point; thence southerly along the east shore of said lake to a point 1 mile north of the St. Joseph River: thence on a parallel line with the north bank of said St. Joseph River, 1 mile distant from said bank, to the east line of the said reservation; thence northerly along the east line of said reservation to the place of beginning.

Now, if we buy this land you still have the St. Joseph River and the lower part of the lake and all the meadow and agricultural land along the St. Joseph River.

SALTISE. I do not quite like those boundaries; you are a chief and have directed your boundaries; now, if you ask us where we want to sell, we could talk.

General SIMPSON. That is right and appropriate. Perhaps you had better talk this over with your people, and we can talk again to-morrow.

SALTISE. The Indians don't like that; their ideas are bent; their minds are made up; there is one great dissatisfaction; it is this: We had a great talk about that other treaty, and I think we had better have that other treaty settled before we make this.

General SIMPSON. We wanted you people to understand about this matter, and I want to tell you now that this new treaty will help the ratification of the other treaty. I would not tell you a lie under any consideration. You understand, this land is not bought unless the other treaty is ratified. You can appoint the time when we will meet again. In the mean time you can all talk the matter over.

SALTISE. It is nearly as much as if they had consented, but they have not hardly made up their minds.

I will appoint Saturday, August 31, the day for the next meeting.

Council then adjourned.

Third council.

DE SMET MISSION, *August* 31, 1889.

Council met pursuant to adjournment. Present, Commissioners General Benjamin Simpson, J. H. Shupe, W. B. Humphrey, chiefs and headmen of the tribe of Coeur d'Alene Indians and their interpreter.

General SIMPSON said: We have met again, pursuant to adjournment. We are glad to meet the representative men. We now want to hear from you in regard to the land we have proposed to purchase.

SALTISE. We met and there was two kinds of talk; one was strong and one was weak. We come to-day to talk about the two understandings, yours and ours. I, mean as an Indian, like my land; am very anxious to have land; I do not care about money. You three gentlemen came to-day to have an understanding about part of our land. My heart has been troubled for three or four days, but now it is all right, because I know this land is my property.

First and all, a long time ago there was an officer with long whiskers came and told us this was our land. Then came General Watkins, and he said for us to hold our land; General Howard said the same thing. Then President Grant, the head of the nation, ratified all the others had done in giving us this land. Two years ago a commission of three appointed by the President came, and we had a long talk; they wanted to treat for land they said was ours; we said it did not matter and would leave it to their generosity; that as this other was settled by the whites they could have it, but we wanted the land of our present reservation, provided we were to hold it forever, as had been promised. They seemed well satisfied, and said they would make a tie to our land that would never be untied, and to-day I think this is still my mind as when we treated with them. We are willing to let some go now – that which lays along the northern boundary of our reservation, and from eastern boundary of Coeur d'Alene River, and western boundary of Coeur d'Alene Lake, and south to mouth of Coeur d'Alene River. We are willing to

relinquish this regardless of the three other commissioners. Here you have plenty of timber, plenty of mineral, and plenty of grass; I am willing to relinquish all this. I understand well this takes in all of the Wolf Lodge country.

General SIMPSON. We want to buy that which you want to sell. The other business was all right. Has the chief said all he wants to say now?

SALTISE. There are five or six Indians who have claims on that land, and I want you to settle with them.

Commissioner SHUPE. We can not treat with any of you as individuals; all our business must be done with your people as a tribe.

General SIMPSON. I want to say that in our instructions as commissioners we were instructed to purchase from the Indians lands for their timber and mineral. I am glad to find that the chief is willing to do what he thinks is right. I think he talks honorably. The only difficulty is the land he wants to sell does not cover that which we wish to purchase. We, as commissioners, have talked this question over and are all of the same mind and are desirous of having the Indians look to their own interests. We will look after your interests as well as those of the Government. We stand between. Of course the more land you let us have the more money you will get.

SALTISE. My dear friends, if our object was money you would be correct, but money is no object; our land we wish to keep.

General SIMPSON. That would be all right if you had a surplus of money, but if you did not have, and had a

surplus of horses or cattle or land, you dispose of the surplus and get money to educate your children and buy machinery to cultivate the land you have left.

SALTINE. You say we have a great deal of land. If we wanted to let it go for money we would say, take more, but we do not care for money; it is land we want. When that other treaty is ratified we will then have land to sell.

(Recess for fifteen minutes.)

General SIMPSON. Well, gentlemen, we have talked the matter over as commissioners, and we would like to know now more particularly about the boundaries on the water lines; it is not what we expected to get, but still we will take this with this understanding: There are some who have claims on these lands and you will settle with them.

SALTISE. We can not sell the land of the Indians who live near the old mission. You had better see them and fix the matter, so they will not get angry and object to the treaty.

General SIMPSON. What will you take for the land and pay those men what they will ask?

SALTISE. We can not put a price, as we do not know the number of acres.

General SIMPSON. We can take the map and make out an estimate.

Commissioner SHUPE. What we do here must be signed by us all, the same as the other treaty.

Commissioner HUMPHREY. We want to know the amount you ask, so it can be put in the agreement.

SALTISE. We do not know how much there is in that piece of land.

General SIMPSON. As far as the mines are concerned we do not know what they amount to; the best prospects are on the Coeur d'Alene and St. Joseph Rivers, but it will be hard to tell about them. The timber is not so good as below the Coeur d'Alene River and the west side of the lake.

SALTISE. There is lots of good timber there that you have not seen.

General SIMPSON. I guess there is some good timber on part of the land. The other two commissioners have agreed upon a price. I am willing to accept their figures. They make an offer of $150,000.

SALTISE. You can write out an agreement and then we will talk about the price; you asked us to set a price, and we have said.

Commissioner HUMPHREY. Any agricultural land there is in this body the Government gets $1.25 per acre for, and the mineral land is not sold at all; those who wish can go and take it up.

SALTISE. The mind of my people is $5 per acre.

Commissioner SHUPE. We expect to pay you well for what we get. The money we would pay you would be of great benefit to you, now that you have progressed so far, in fitting up your farms and buying good stock and machinery. The agricultural land will be taken up as homesteads; the Government gets nothing for that, and the mineral land is also taken up without any pay to the Government.

General SIMPSON. We can not pay $5 per acre, for Congress would not ratify it; neither would they allow an insignificant amount that would be an injustice to you. I think if you will consider for a day or so you can come to a fair conclusion.

SALTISE. I prefer to have it finished to-day; we are under expense and busy with our crops, so we wish to finish it to-day.

General SIMPSON. We will make the sum total $250,000, which, with what the Government now owes you, would make $400,000, if ratified.

Now, friends, we have had a good deal of talk, and we think we have offered you all your property is worth, every dollar, and as your best friends we think you had better accept the offer and have that money to use. When we get through we have our report to Washington to make; then we are no longer commissioners. We would be very glad if we could come to an understanding, as it would be much better for you and please them at Washington. What we have offered you amounts to $5 per acre for the land that amounts to anything, and will amount to $2.50 for all, both good and bad. Fifty thousand acres will cover all the valuable land, both timber and mineral: that would be $2.50 per acre. Then, when this is done, there will be no more trouble with people prospecting for mines in that part of the country, and the mines you will have left will be three times more valuable than these. There is another thing we wish to say in conclusion. If you accept of our proposition and the business is all done, you can go to Washington and see that these treaties are ratified and the money paid. I am done.

SALTISE. You know it is against our wishes to sell any land, but you wanted to buy. We did not care for the land on the west by Spokane. I think it is worth what we ask. We offered that and you think it is too much. When you make your report to Washington let them say whether it is too much.

Commissioner SHUPE. Another thing the chief does not seem to understand is this: We are sent to inspect and place a value on the land. The people at Washington do not know what this land is worth, and for that reason we have been appointed as a commission to come here, examine the land, and to offer you a fair and reasonable price for it. While we do this as a commission sent from Washington, and in their interests, we are also expected to guard your rights and interests as well. We come here as friends to both parties and to treat fairly with both. We have examined the land and think our offer is fair and just.

SALTISE. I know you have been sent by Washington. I respect you for it. We would have been let alone if it had not been for outsiders; they have been the cause of sending you as a commission to buy this land. Now you see the way it stands. Of course the land is not all good, but some of it is, and mines are cheap at $5 per acre.

Commissioner HUMPHREY. We do not, neither does any one else, know whether these mines are of any account or not.

General SIMPSON. We prospected some and found a few specimens of silver and gold.

SALTISE. You make your report at $5 per acre and I think they will say it is all right.

After an informal talk regarding the price of the land and of conferring with the Secretary of the Interior by telegraph, the council adjourned.

Fourth council.

DE SMET MISSION, *September* 8, 1889.

Council met by special arrangement. Present: Commissioners General Ben. Simpson, J. H. Shupe, and H. B. Humphrey; chiefs, headmen, and male adults of the Coeur d'Alene tribe of Indians, and their interpreter.

General SIMPSON said: Well, my friends, I am glad to meet you again. It is some time since we met. We have come to-day to hear what you have to say regarding the purchase of those lands. We will soon be compelled to leave you and go to Washington, and would be glad now to hear just what you have to say.

PIERRE WILDSHOW (second chief). I am glad that you have asked my mind. What you want of my reserve I won't refuse. When you told me what you wanted to take I did not refuse, and if you want, you can have half and let us keep half. And if you want, you can have some of the agricultural land, good for farming; then there will be no trouble between us and the whites. The young Indians want to make the Coeur d'Alene River the line and from Spokane bridge down to Rockford, giving the two big mountains. I tell you this to make your hearts good and the Indians' hearts good. No white men have told us to say this; we, as Indians, say it ourselves. I am done.

General SIMPSON. We understand you to mean on the west side – this side of the lake, down to Rockford from Spokane bridge, and along the northern boundary. I want you to extend this line from the mouth of the Coeur d'Alene River due east to the boundary of the reservation. You can speak now among yourselves and understand the line, and if satisfactory I think we can make an arrangement.

PIERRE WILDSHOW. I tell you now, make the line where you said; if you had made the line where I said there would be no objections. Since you wish to make the line where you have proposed this last time it will give us a little more land.

Are you sure now that they will ratify that former treaty that was made? That is all we want now, the ratification of the former treaty.

There are two old men living at the old mission. They don't know about what we are talking of this matter. We want extra pay for them, as they have land fenced. There are four men living near Spokane bridge who have farms; also along the Coeur d'Alene River there are men who have improved places, but do not live on them now: they want extra pay for those improvements. And near Fort Sherman an Indian has fenced a hay farm from which he sells hay every year; he also wants extra pay. That is all I have to say.

General SIMPSON. You ask if the former treaty will be ratified. I will say, yes, it will be ratified. We will have a clause in this agreement that if not ratified this is no good and is null and void.

And now we will say what we propose to do if you will make the line as follows: Beginning at the northwest corner, running thence along the western line twelve miles south, thence due east to the Coeur d'Alene Lake, thence along the shore of said lake to a point due west from the mouth of the Coeur d'Alene River, thence due east to the line of the reservation, thence along the line to the northeast corner of the reservation, thence along the northern boundary to the place of beginning.

For this land we will give $500,000, the money to be paid when the treaty is ratified. That will make in all $650,000; $150,000 to be paid according to the provisions of that treaty, and $500,000 to be paid as soon as Congress ratifies this treaty.

We are giving more than we expected to pay when we came, but under our orders we are compelled to leave here very shortly and must conclude the matter. I am satisfied we are paying all the land is worth. If you agree to accept this offer you must settle the claims of Indians living on the lands sold among yourselves. We can not pay them in addition to the amount paid for the land. We can pay only the $500,000. We expect to report the papers to Washington soon and recommend they be considered as early as possible.

SALTISE. You pay that amount for the land that is not fenced. We want pay for that that is fenced. We did not know that it was from the sum we received from the railroad company that those who were damaged were to be paid.

General SIMPSON. We are willing to give you $500,000. It is more than the land is worth, but we give it so that

those men who should have more can be paid out of this amount.

SALTISE. From who will we get the $500,000?

General SIMPSON. From the Government; a man will be sent from Washington as soon as the treaty is ratified. I expect to go to Washington as soon as we are through, and will urge them to pay the money immediately after the treaty is ratified.

SALTISE. I do not want to talk much. I want those men who have farms to be paid extra and not from the $500,000. Put down about those six men holding claims on the land we propose to sell.

BAZIL (subchief). Did you not say when you came that Washington did not want you to buy farms?

General SIMPSON. Our instructions from Washington was to buy timber and mineral lands, and not farming land. We have placed the line above Rockford, so that we will not take any of those farms.

SALTISE. Give those six men living on this land sold a right to sell their farms to white men.

General SIMPSON. The Government will not allow us to do that.

SALTISE. If you had a farm and they would sell the land around it, would you give up your farm?

General SIMPSON. I do not want those men to give up their farms; they get pay for them from the $500,000.

SALTISE. We are going to give them their share of the $500,000, but want extra pay for their improvements.

General SIMPSON. We can not go over the $500,000. We will pay that and urge the Government to settle as soon as ratified.

SALTISE. It is not from you we want the pay.

General SIMPSON. We have offered you more than any other commissioners would pay.

SALTISE. Five hundred thousand dollars is a little sum: the ground is full of gold that is worth millions.

We are in a hurry to get through thrashing; can you come to-morrow and get those here at the mission to sign the agreement, and then go and see the ones who are out harvesting?

General SIMPSON. We will come to-morrow with the agreement and get all who can come here to sign, then go to those who are harvesting.

SALTISE. At the council yesterday I could not talk, as I was sick: I acted as though I was absent; I want you to understand it was just the same as cutting my left arm off; you talked so truthfully and acted so gentlemanly that it is fast healing up the sore, and now that the talk is over, I thank you in the name of my people for all the trouble we have caused you by detainment and otherwise. I hope now that you have all come to the same heart that you and the people at Washington will be as well satisfied and thankful as we are. I hope the Secretary of Interior and President will consider what we have said and not throw it to one side, for all I say is sincere and warm from my heart. We trade as strangers; but you must remember you are our friends, for you gave us these lands we love so well. We know that the country we have

given you is very rich in gold and silver, but we say you may have it; our hearts are satisfied, and we hope yours will be.

General SIMPSON. I want to say now in behalf of the commission that we are glad to hear the expressions of the chief of the Coeur d'Alene Indians. We look upon what he has said as emanating from a noble heart and a noble man. We hope and trust that the friendship that now exists may continue forever. We are glad that after several days' talk we have come together with one heart and one mind. All that the chief has said will go to Washington, and we shall certainly state in our report that the chief is worthy to be a great leader of his people, and we shall ask the Secretary of the Interior and President to read all he has said and consider it comes from a pure, good man.

Chief Saltise selected the following to go to Washington: Pierre Bartholomew, Regis, Pierre Wildshow, Stephen Liberty.

Commissioner HUMPHREY. Before we came we were strangers to you, but we had heard Saltise, chief Coeur d'Alene, spoken of by the officers in Washington as an honest man: since we have met you we know this to be true. You and your tribe and the fathers and the interpreter have treated us with great kindness. I am well satisfied that an Indian chief is greater in peace than in war. Your tribe have farms, grain, cattle, horses, peace, and homes. These are the fruits of peace. You have done your duty as the chief of your people.

Commissioner SHUPE. You have heard my brother commissioners talk, and we want you to understand that

we are all of one mind. We knew that you as Indians loved your lands, and know that you are sorry to part with them, but we feel that the best has been done for you and that you will agree with us, when this matter is all settled, that you, as a tribe, will be far better off by having done what you have than if you had kept your land. When the conditions of these agreements are settled you will still have plenty of land left for farming and pasture, and the money that you will receive will enable you to improve your farms, and give you a community that will be far wealthier than your neighbors, the whites. Like your chief, we hope that the friendship now formed will never be forgotten, and that we may all some day be able to visit you again as friends.

Agreement.

This agreement, made pursuant to an item of an act of Congress, namely: Section 4 of the Indian appropriation act, approved March 2, 1889 (25 Stat. 1002), by Benjamin Simpson, John H. Shupe, and Napoleon B. Humphrey, duly appointed commissioners on the part of the United States, parties of the first part, and the Coeur d'Alene tribe of Indians, now residing on the Coeur d'Alene Reservation, in the Territory of Idaho, by their chiefs, headmen, and other male adults whose names are hereunto subscribed, parties of the second part, witnesseth:

ARTICLE 1.

For the consideration hereinafter named, the said Coeur d'Alene Indians hereby cede, grant, relinquish,

and quitclaim to the United States, all the right, title, and claim which they now have, or ever had, to the following described portion of their reservation, to wit: Beginning at the northeast corner of the said reservation, thence running along the north boundary line north 67° 29' west to the head of the Spokane River; thence down the Spokane River to the northwest boundary corner of the said reservation: thence south along the Washington Territory line twelve miles: thence due east to the west shore of the Coeur d'Alene Lake; thence southerly along the west shore of said lake to a point due west of the mouth of the Coeur d'Alene River where it empties into the said lake; thence in a due east line until it intersects with the eastern boundary line of the said reservation: thence northerly along the said east boundary line to the place of beginning.

ARTICLE 2.

And it is further agreed, in consideration of the above, that the United States will pay to the said Coeur d'Alene tribe of Indians the sum of $500,000, the same to be paid to the said Coeur d'Alene tribe of Indians upon the completion of all the provisions of this agreement.

ARTICLE 3.

It is further agreed that the payment of money aforesaid shall be made to the said tribe of Indians pro rata or share and share alike for each and every member of the said tribe as recognized by said tribe now living on said reservation.

ARTICLE 4.

It is further agreed and understood that this agreement shall not be binding on either party until the former agreement now existing between the United States by the duly-appointed commissioners and the said Coeur d'Alene tribe of Indians, bearing date of March 26, 1887, shall be duly ratified by Congress; and in the event of the ratification of the aforesaid agreement of March 26, 1887, then this agreement to be and remain in full force and effect but not binding on either party until ratified by Congress. In witness whereof the said Benjamin Simpson, John H. Shupe, and Napoleon B. Humphrey, on the part of the United States, and the chiefs, head-men and other adult male Indians, on the part of the Indians, parties hereto, have hereunto set their hands and affixed their seals.

Done at the De Smet Mission, on the Coeur d'Alene reservation, in the Territory of Idaho, this the 9th day of September, in the year of our Lord one thousand eight hundred and eighty-nine.

BEN SIMPSON.
JOHN H. SHUPE.
NAPOLEON B. HUMPHREY.

Signed with an x mark and seal.

Witness:

S. E. LIBERTY.
L. BARTHOLOMEW.
M. S. MONTEITH.

Andrew Seltice, chief; Pierre Wheyilshoo, second chief; Selepsto Vincent, second chief; Regis, chief police; Etienne Nethen, Samuel, Conillius, Pierre Bartholomew,

third chief; Adrian, Moses Skaooell Joseph, Marcesella, Abram, S. Liberty, Nicodemus, Perre, Moiesse, Abraham, Satanislas, Zacharie, Andrew, Benjaoist, Joseph, Saiuta, Piose, Pierre, Thomas, Louies, Joe, Andrew, Samuel, Francois, Camma Shool, Charles, Benoist, Ignatz, Andrew Humerous, Leo Peion, Paul James Fenley, Barniby, William Mason, Saul Louis, Peion, Pierre Mullion, Samuel Sam, Simon Chemanans, Thomas Bacon, Alexander, Edmond Liberty, Ignats, Pierre Vansion, Timothy, Towado, Augustus, John Pevey, Adolph Butler, Jerry Butler, Alfred Butler, La Debauche, Chief Peter Bazel, Louis Stanflaus, Andresha, Louis Seebastion, Subastien, Louis Too Too, Leo Sucots, Paul Plotkan, Luke, Louis Mulcupee, Leo Amothacutso, Louis Bartholomew, Medore Boone, Louis Bazil, Leon, Baptist, Joseph, Louis, Prosper, Samuel, Andrew, Ignatz, Louis Grizzly, Camille, Barcissela Fort Chief, Fat Timothy, Reaching Patrick, Curly Paul, Ignatz Paul, Alixes, Peirre Louis, Stanisla, Peael, Joseph, Growing Tree Pierre, Louis Victor, Spokane Ignatz, William Smoke, Anastus, Daniel Quinamost, Pén 'Dorielle Paul, Hog Timothy, Old Mission Edward Chief, Too Too, Gabriel Too Too, Joseph Newell, Peirre Anasta, Broken Leg Louis, Francis, Michael Bartholomew, Half-a-Year, Young Man Charles, Adrian, Charles Agustus, Ena Moses, Cassime, Old Man Charles, Peirre Charpa, Bonametse, Pat Pilishiu, Carmelle, Bazille, Benoir, Joshua, Ocotaba, Sticha, Lolo, Louis Sequenta, Layo Tumpklin, Paul Selmustushu, Old Man Neyus, Holamage, Loto See, Pierre Joseph, Gasper Barrano, Louis Melkepsie, Arriph, Louis Arriph, Sebastian Quillak, Louis Totoniha, Leon Schatoux, Louis Tilpialima, Philip, Leo Amouthasout, Paul Atchina, Antoine Soanutap, Patrick Nixon.

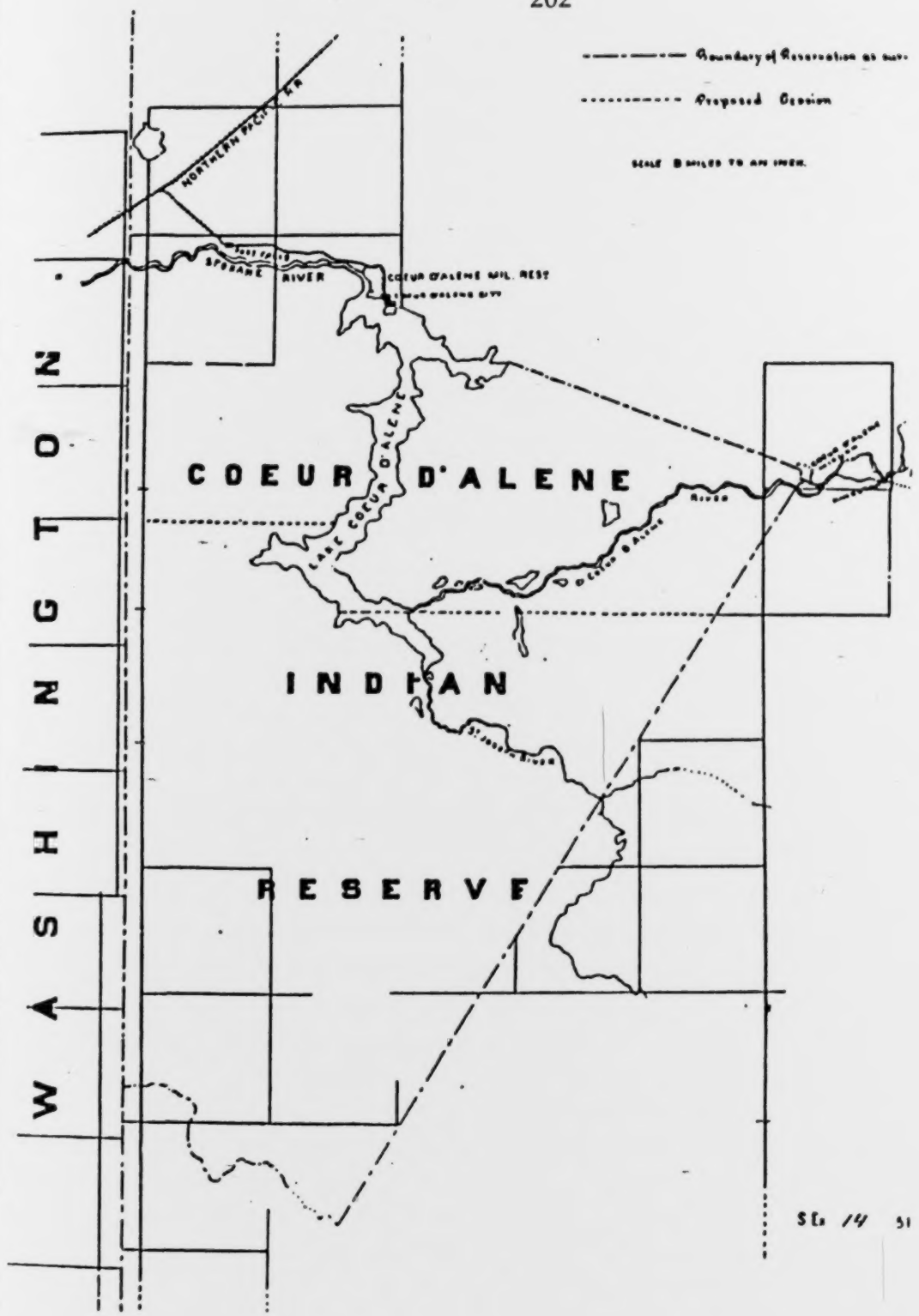
I, Stephen E. Liberty, United States Interpreter for the Coeur d'Alene Agency, Idaho Territory, do hereby certify on honor that the foregoing agreement was carefully read and by me correctly interpreted, and that the contents thereof were fully explained to and fully understood by said Indians before the signing and sealing of the same.

STEPHEN E. LIBERTY

Witness:

LOUIS BARTHOLOMEW.

M. S. MONTEITH.


Boundary of Reservation as now
Proposed Cession
SCALE 8 MILES TO AN INCH.
NORTHERN PACIFIC R.R.
SPOKANE RIVER
COEUR D'ALENE MIL. REST
COEUR D'ALENE CITY
LAKE COEUR D'ALENE
COEUR D'ALENE
RIVER
INDIAN
RESERVE
WASHINGTON
Sec. 14 51

COEUR D'ALENE INDIAN RESERVATION.

House Ex. Doc. No. 63, Fiftieth Congress, first session.

MESSAGE

FROM THE

PRESIDENT OF THE UNITED STATES,

TRANSMITTING

A communication from the Secretary of the Interior, with accompanying papers, relating to the reduction of Indian reservations.

JANUARY 9, 1888. – Referred to the Committee on Indian Affairs and ordered to be printed.

To the Senate and House of Representatives:

I transmit herewith a communication of 30th December, 1887, from the Secretary of the Interior, submitting, with accompanying papers, two additional reports from the Commission appointed to conduct negotiations with certain tribes and bands of Indians for reduction of reservations, etc., under the provisions of the act of May 15, 1886 (24 Stats., 44), providing therefor.

GROVER CLEVELAND.

EXECUTIVE MANSION,
January 9, 1888.

DEPARTMENT OF THE INTERIOR,
Washington, December 30, 1887.

The PRESIDENT:

Under the respective dates of January 11 and February 17, 1887, I had the honor to submit to you for transmittal to Congress two separate reports received by this Department through the Commissioner of Indian Affairs from the Commission commonly known as the Northwest Indian Commission, appointed under the provisions of the act of May 15, 1886, to negotiate with certain Indian tribes in Minnesota and the Northwest Territories (24 Stats., 44).

Those two reports, with their accompanying correspondence, which may be found in Senate Ex. Docs. No. 30 and No. 115, Forty-ninth Congress, second session, relate, the first to an agreement made with the Arickaree, Gros Ventre, and Mandan Indians residing upon the Fort Berthold Reservation in Dakota, and the other to two agreements made with certain of the Chippewa Indians in the State of Minnesota.

I now have the honor to submit herewith two additional reports made by the said commission, with the accompanying letter of the Commissioner of Indian Affairs forwarding them to the Department, with five agreements made with various tribes and bands of Indians in the Northwest, viz: The Gros Ventre, Piegan, Blood, Blackfeet, and River Crow Indians upon the reservation commonly known as the Great Blackfeet Reservation in northern Montana; the Upper and Middle bands of Spokane Indians; the Coeur d'Alene Indians; the Pend

d'Oreille or Calispel Indians; the Indians upon the Jocko Reservation in Montana.

The Commission report that they visited the Bois Forte and Grand Portage Reservations in Minnesota and held council with the bands thereon, but failed to secure their acceptance of or consent to the agreements made with the other Chippewas on September 7, 1886.

The five agreements now presented, together with the three heretofore reported, complete the work of negotiation so far as it could be accomplished by the Department with the tribes and bands of Indians for which provision was made in the act of May 15, 1886.

The Commissioner of Indian Affairs in his report, herewith, reviews at some length the provisions of each of the accompanying agreements, which may be briefly though very generally summarized, as follows:

The agreement with the Indians in northern Montana provides for the cession to the United States of over 17,500,000 acres of the large reservation now occupied by them, estimated to contain 21,651,000 acres, for a consideration of $4,500,000, to be expended for the benefit of the Indians in manner therein provided, in ten annual installments, so far as may be required; any excess above such requirements to be placed in the Treasury to their credit, etc. The unceded portion of the reservation to be divided into three separate reservations, whose boundaries are given, for the Indians belonging to the three agencies located therein.

The Upper and Middle bands of Spokane Indians, in the agreement with them, relinquish to the United States

any right, title, and claim which they now have or ever had to any and all lands lying outside of the Indian reservations in Idaho and Washington Territories, and agree to remove to the Coeur d'Alene Reservation in Idaho, except such as prefer to go to the Jocko Reservation, in Montana, the consideration being $95,000, to be expended for their benefit in manner as specified in the agreement.

The Coeur d'Alene Indians, in the agreement made with them, relinquish to the United States, for the consideration of $150,000, to be expended for their benefit, etc., all right, title, and interest they now have or ever possessed to and in any lands outside the limits of their present reservation in the Territory of Idaho; they also agree to the removal to and settlement upon their reservation of the Upper and Middle bands of Spokane Indians, the Calispels (Pend d'Oreilles) now residing in the Calispel Valley, and to any other bands of non-reservation Indians belonging to the Colville Agency, Washington Territory, etc.

The Pend d'Oreille or Calispel Indians, in agreement made with them, relinquish all right, title, and claim they have or ever had to lands in Idaho or Washington Territories or elsewhere, and agree to remove to and settle upon the Jocko (Flathead) Reservation, in Montana, except such as may prefer to go to the Colville Reservation, in Washington Territory, or to the Coeur d'Alene Reservation, in Idaho Territory; the consideration being the erection of saw and grist mill, building houses for Indians, clearing and breaking lands, etc.

The Indians on the Jocko (Flathead) Reservation, in the agreement with them, consent to the removal to and settlement upon their reservation of the Upper and Middle Spokanes and Pend d'Oreilles; the consideration being the erection on the reservation for the Indians, by the United States, of a saw and grist mill, and providing a blacksmith and tools, etc.

The law under which these negotiations have been conducted provides that "no agreement shall take effect until ratified by congress."

The Commissioner of Indian Affairs in his report herewith expresses the opinion that these agreements are just and favorable alike to the Government and to the Indians. He recommends their speedy ratification, and submits estimates of the various amounts required to be appropriated at this time by Congress to carry out the terms of the negotiations, which will be found on the concluding pages of his report.

By these negotiations a very large area of land now in state of reservation for Indian purposes, being the excess of quantity needed for the actual use of the tribes and bands for whom it has been held in reservation, is placed at the disposal of the United States so that it may be opened to settlement in such manner as Congress in its wisdom may direct; and further, the adjustment of claims asserted by Indians to large portions of land in Washington and Idaho Territories, now largely occupied by settlers, is provided for. When these negotiations shall have been fully ratified they will remove some serious hindrances to the contentment, the permanent settlement, and the more rapid advancement in civilization of the

tribes and bands who are parties thereto. The money necessary to be appropriated for their support and to assist them forward in the ways of civilization will not be, as heretofore, so largely a gratuity from the Government, but will go to them by judicious expenditures as consideration for valuable rights and claims which they have ceded and relinquished to the Government.

For these and other like reasons I concur in the recommendation of the Commissioner that the agreements be speedily ratified.

I have the honor to be, very respectfully, your obedient servant,

L.Q.C. LAMAR,
Secretary

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, December 13, 1887.

SIR: Referring to office reports, dated January 8 and February 11, 1887, respectively, transmitting two separate reports of the Northwest Indian Commission and accompanying agreements made with the Arickaree, Gros Ventre, and Mandan tribes of Indians occupying the Fort Berthold Reservation, in Dakota, and the Chippewa Indians in Minnesota, which reports, agreements, and accompanying papers form the subject-matter of Senate Ex. Docs. No. 30 and 115, respectively, Forty-ninth Congress, second session, I now have the honor to transmit here with duplicate copies of two additional reports of said Commission and accompanying agreements (five in all) made with the several tribes in northern Montana,

occupying the Gros Ventre, Piegan, Blood, Blackfeet, and Crow River Reservation, commonly known as the Great Blackfeet Reservation, and the Upper and Middle bands of Spokane Indians, the Pend d'Oreilles, or Calispels, and the Coeur d'Alenes in Idaho, and the Flathead, Pend d'Oreille and Kootenai Indians of the Flathead Reservation in Montana. These reports are dated, respectively, February 11 and June 29, 1887.

* * *

The authority under which these several agreements were negotiated is found in the Indian appropriation act, approved May 15, 1886 ([illegible] Stats., p. 44), which reads as follows:

To enable the Secretary of the Interior to negotiate with the several tribes and bands of Chippewa Indians in the State of Minnesota for such modification of existing treaties with said Indians and such change of their reservations as may be deemed desirable by said Indians and the Secretary of the Interior, and as to what sum shall be a just and equitable liquidation of all claims which any of said tribes now have upon the Government; and also to enable said Secretary to negotiate with the various bands or tribes of Indians in northern Montana and at Fort Berthold, in Dakota, for a reduction of their respective reservations, or for removal therefrom to other reservations; and also to enable said Secretary to negotiate with the Upper and Middle bands of Spokane Indians and Pend d'Oreille Indians, in Washington and Idaho Territories, for their removal to the Colville, Jocko, or Coeur d'Alene Reservations, with the consent of the Indians on said reservations; and also to enable said Secretary to negotiate with the Coeur d'Alene Indians for the cession of their lands outside the limits of the present Coeur d'Alene Reservation to the United States, $15,000, or so

much thereof as may be necessary, to be immediately available; but no agreement shall take effect till ratified by Congress.

* * *

AGREEMENT WITH THE COEUR D'ALENE INDIANS.

These Indians also lay claim to a large tract of country in Washington, Idaho, and Montana Territories, by right of original occupancy, and, as we have seen, the act authorized negotiations with them "for the cession of their lands outside the limits of the present Coeur d'Alene Reservation to the United States."

By the terms of the agreement made with them, the Indians cede and relinquish to the United States all right, title, and interest they now have or ever possessed in any lands outside the limits of their present reservation.

They also agree to the removal and settlement upon their reservation of the Upper and Middle bands of Spokane Indians, upon the terms and conditions agreed upon with said Spokane Indians, and also to the removal and settlement there of the Calispels (Pend d'Oreilles) now residing in the Calispel Valley, and any other band of non-reservation Indians belonging to the Colville Agency, upon terms agreed upon with any such bands.

In consideration of the foregoing, it was agreed that the Coeur d'Alene Reservation shall be forever held as Indian lands, for the home of the Coeur d'Alene and other bands settled there under said agreements, and that it shall never be sold or otherwise disposed of without their consent.

It is further agreed that the United States shall expend the sum of $150,000 for the benefit of the Coeur d'Alene Indians: $30,000 the first year and $8,000 per annum for fifteen years thereafter, in providing them with a steam saw and grist mill, in the employment of an engineer and miller, and in the purchase of such useful articles as shall best promote their civilization, education, and comfort, and, under certain stipulated conditions, cash payments may be made to them. In addition to this, it is agreed that the United States shall employ, at its own expense, a competent physician, blacksmith, and carpenter, and supply medicines for said Coeur d'Alene Indians.

There are some other provisions intended to protect the morals and improve the condition of said Indians, but the foregoing are the principal features of the agreement.

The Commissioners give an interesting account of the Coeur d'Alene Indians, and commend them in the highest terms for industry, thrift, and sobriety. They speak of them as polite in a marked degree and exceedingly good-natured. They wear short hair, dress like the whites, and emulate them in everything save their vices. They live in comfortable houses, many of them having two – one on the farm and another in the village – cultivate the soil extensively, are loyal to the Government, respectful of the laws, devoted to their religion, and in short a better ordered or behaved community of Indians can nowhere be found. Such is the testimony of the Commissioners.

* * *

The agreements with the Upper and Middle bands of Spokane Indians and the Pend d'Oreille Indians provide for their removal and settlement upon the Coeur D'Alene and Jocko Reservations, and for the settlement of claims against the Government on account of lands taken from them in times past without compensation. The severalty act could not accomplish these much-desired objects, nor could it be substituted for other beneficent provisions found in said agreements with the Coeur d'Alene and Flathead (Jocko Reservation) Indians. The former provides for the settlement of a land claim similar to those of the Spokanes and Pend d'Oreilles; and also makes provision for the settlement of the Spokanes on the Coeur d'Alene Reservation, while the latter provides that the scattered Pend d'Oreille and other Indians may settle on the Jocko Reservation; objects greatly to be desired.

From all that has been said, then, it will be seen that the several agreements must stand upon their own merits, irrespective of the severalty act, whose provisions it will be my endeavor to carry out wherever practicable. To my mind the agreements are just and favorable alike to the Government and Indians. Millions of acres of land, equal to a great State, are made available to the white settler; long-standing and provoking claims against the Government are amicably adjusted; a very large number of Indians hitherto living in idleness, poverty, and vice – a standing menace to the peace of the country – are to be gathered upon existing reservations, and assisted in the paths of civilization and toward their final self-support; and I think if faithfully carried out the future of these Indians will be extremely hopeful.

I therefore have the honor to recommend their speedy ratification.

Should Congress be pleased to take such favorable action thereon, the following sums of money should at the same time be appropriated to carry the agreements in effect, viz:

NORTHERN MONTANA INDIANS.

First installments, as per Article III of the agreement with the Indians of the Great Blackfeet Reservation..... $430,000

NOTE. – Congress appropriated $235,000 for the support of these Indians, the current Fiscal year, *as an absolute gratuity.*

UPPER AND MIDDLE BANDS OF SPOKANE INDIANS.

First installment, as per Article V of the agreement with said Indians..... $30,000

Pay of blacksmith and carpenter, at $900 each, Article VI 1,800

Pay of six chiefs, at $100 each, Article IX..... 600

Total 32,400

COEUR D'ALENE INDIANS.

First installment, as provided in Article VI of agreement.....30,000

Pay of physician.....$1,200

Purchase of medicines 150

Pay of blacksmith 900

Pay of carpenter 900

3,150

Total 33,150

PEND D'OREILLE OR CALISPELS.

Article 1: Saw and grist mill $6,225

Dwelling houses (40) 6,000

Clearing, breaking, and fencing 1,500

Engineer, $720; miller, $720; carpenter, $900; blacksmith, $900 3,240

Cows, $3,200; horses, $10,000; wagons, $2,000; harnesses, $600; stoves and agricultural implements, $1,500; clothing, medicines, and seeds, $2,500; removal of Indians, $1,000; Article III, pay of chief, $100 20,900

Total 37,865

FLATHEADS AND OTHER INDIANS OF JOCKO RESERVATION.

Saw and grist mill $6,225

Pay of miller $720

Pay of blacksmith 900

1,620

Purchase of tools 500

Total 8,345

Very respectfully, your obedient servant,

J.D.C. ATKINS,
Commissioner.

* * *

REPORT OF NORTHWEST INDIAN COMMISSION.

Washington, D. C., June 29, 1887.

Hon. J. D. C. ATKINS,

Commissioner of Indian Affairs, Washington, D.C.:

SIR: We hereby beg leave to submit a report of our proceedings with the Upper and Middle bands of Spokanes, Coeur d'Alenes, Lower bands of Pend d'Oreilles or Calispels, Confederated bands of Flatheads, Pend d'Oreilles, and Kootenais, Chippewas of Bois Forte, and Grant Portage Indians, residing in the Territories of Washington, Idaho, and Montana, and the State of Minnesota. Whilst on the way returning from the Blackfeet Agency, in the Territory of Montana, wither the Commissioners – Wright, Daniels, and Larrabee – had been, in order to make negotiations with the Piegans, Bloods, and Blackfeet tribes, a full report of which has heretofore been submitted, we received instructions by telegraph, forwarded by mail, announcing that Major Larrabee had been recalled, and that Henry W. Andrews, of the State of New York, had been appointed to succeed him as Commissioner. On our arrival at Helena, in the Territory of Montana, after a short and necessary delay, in order to

give time to Messrs. Larrabee and Andrews to arrange and settle between themselves their accounts as disbursing agents of the Commission, we proceeded on our journey. We arrived at Helena about 9 o'clock at night, having traveled in open sleighs on that day a distance of about 60 miles.

On account of heavy snows on the mountains the trains were delayed, and we did not leave Helena until the morning of the 23d, at 3 o'clock.

Arriving at Spokane Falls, Washington Territory, by rail, on the night of February 23, we at once set about ascertaining the location and disposition of the Indians in that locality.

* * *

COEUR D'ALENE.

As soon as possible after concluding the agreement with the Upper and Middle bands of Spokanes, and settling the business incident to the council, we proceeded at once to the Coeur d'Alene Reservation in the Territory of Idaho.

We went from Spokane Falls to Belmont, the terminus of the Spokane and Palouse Railroad, at which point we were met by parties with wagons who conveyed us to the town of Farmington, in Washington Territory.

On the next morning we proceeded to the Coeur d'Alene Reservation, 12 miles distance. The day was bright, and we had a fine opportunity of seeing the country, which is the finest in the West. We were informed whilst on our way that the chief, with an escort,

would meet us and proceed with me to the De Smet Mission, where the council was to be convened. The firing of a salute announced that the chief was near. We soon discovered the chief with about forty mounted men, armed with Winchester rifles, which they fired as the Commissioners approached. The chief dismounted, advanced in front, and welcomed the Commission to the reservation. The party then moved on, the soldiers marching on either side of the road. At the village the entire male population and many women and children had assembled. The chief, in a neat address, received the Commissioners, to which the chairman made reply, which was greeted with loud applause. The whole body of Indians then filed in front of the Commission, each one shaking hands with them and saying some kind words.

The reservation is one of the best we have visited. The Indians have good productive farms, good houses, barns, gardens, horses, hogs, cattle, domestic fowls, wagons, agricultural implements of the latest pattern, and indeed everything usually found on flourishing farms. The Indians are industrious, thrifty, provident, and good traders, they wear their hair short, and dress in citizen's dress from head to foot. They are polite, good natured, and ambitious to excel, and to do in all things as white men do, except to adopt their vices.

There may be a few exceptions, but so far as not to excite comment. Each one has a comfortable house on his farm, and nearly all have equally comfortable houses at the Mission, which together make quite a village. They remain on their farms during the week days, and on the Sabbath they repair to their dwellings at the village to attend religious services and see their children, who are

at the Mission schools. Their land outside of the reservation, and much of it the best in that country, has been appropriated by the whites, and the Indians have never received a dollar.

They have been the friends of the white people in times of great trouble, and many owe their lives and property to the protection afforded them by these Indians against hostile tribes. As we were not to meet them in council, as they requested, until the next morning after our arrival, we were invited to visit their schools, which we did. Both school-houses are large, well constructed, and stylish in appearance. Inside they are neat, clean, and in every way suitable for schools. On entering the school room the boys arose and stood until we were seated. Paul Polatkin, a full-blood Indian boy of twelve years, stepped to the front and in a clear and distinct voice said:

"Honored Sirs: It is with feelings of great pleasure that I, in the name of my fellow-classmates, extend to you a cordial welcome to our school. We first thought that we would not have the pleasure of seeing you here, as it was rumored that you would call the chiefs to Spokane Falls, and there transact whatever business you had with them. We are glad you decided otherwise. It will give you a chance to see how our people live and support themselves.

"You will see at a glance that they 'earn their bread by the sweat of their brow,' as the land around here testifies. You will also see that here at school we are by no means idle, but try every day to add another grain of knowledge to our store. Hoping our exercises will please you, we welcome you to our school."

The exercises were of the most interesting and satisfactory character. The proficiency shown by these Indian children was as great as that of any school anywhere ever visited by the Commission.

At the close of the exercises Judge Wright thanked the boys for the cordial welcome they had given the Commissioners. He said he was delighted with their country. It was not only a beautiful country, but what was better, he saw that it was appreciated. He saw houses, farms, and other evidences of prosperity, which surprised him. His pleasure was greatly increased at seeing that Indian boys were the equals of the white boys in capacity to receive an education. He assured them that they had nothing to fear or to be ashamed of, and that if they continued in the path in which they were now walking they would reach a point where they would stand on equal ground with their white brethren, deserve and receive all the rights of American citizenship, and have opened to them all the avenues of fortune, fame, and happiness accorded the most favored people. In conclusion, he assured them that the Commissioners would do all in their power to protect the rights, advance the interests, and promote the prosperity of the Coeur d'Alenes.

The girls' school was then visited, and what has been said of the boys' school is equally applicable to this. On entering the school-room we were greeted with a song of welcome by the children and the music of the organ.

The voice of the Indian woman in singing is peculiarly beautiful and touching. There is a tone of gladness mingled with melancholy which is indescribable and can only be felt. This may be accounted for on the theory that

traditional accounts of the sufferings of that race and the centuries of wrongs endured have made so deep an impression that even the dawn of a better and brighter day can not entirely obliterate. Every sensitive heart must have been touched to the core when they all sung together, "Will we know each other there." When the singing ceased Mary Josette, aged twelve, a full-blood Coeur d'Alene, delivered this address:

"Respected Sirs: Allow me in the name of my dear little companions to offer you our glad greeting and to bid you a fond welcome to our happy convent home today. True, we are but simple little children of the forest, yet our young, untutored hearts have learned to love and revere the kind friends of our parents and tribe, and we trust that you too have come animated by that same worthy zeal which has distinguished so many of your predecessors – the future welfare of the Indians.

"Deeming that such is your motive, please accept our thanks for the deep interest you have manifested in our regard, and may God bless you and reward you an hundredfold for your noble and generous deeds and grant you a pleasant and prosperous journey to your far-distant homes."

One by one the classes were called and exercises given in spelling, reading, writing, geography, history, and arithmetic. Notwithstanding the native modesty and timidity of Indian girls in the presence of white strangers, they stood the test beyond any anticipation. They were not only ready in answers, but it was apparent to all that they thoroughly understood what they were doing and

saying. Some of them solved with apparent ease problems in arithmetic which would give trouble to many graduates of Eastern female schools.

At the conclusion of the address Judge Wright said that the Commissioners had visited the boys' school and were delighted with the progress there shown, but he believed that the girls, if possible, excelled the boys. He did not know whether to attribute this expression of opinion to the fact of his gallantry. He believed, however, that it was conceded that the girls advanced more rapidly at school than boys; certain he was that he had never seen a school in his own section of the country which for good order and proficiency in study excelled this one. Any American having a daughter at school showing such proficiency in study as you have shown might well feel proud of her. He said, I see that you are not all Indians; some of you are half, and a few the children of white parents. It is indeed a pleasing sight to witness the children of the white and red races mingling together in the same school – all marching in the same path, with the same hopes, the same aspirations, the same flag of red, white, and blue, the same country, and all striving to reach the same blue heaven above. You should be thankful to the great Creator, the Father of us all, that he has sent to you in this wilderness the holy Fathers, Mothers, and Sisters to lead you in the paths of virtue and happiness.

Some of you missed a word or two in spelling. Do not allow that to discourage you, for there were some words given you to spell that would have puzzled either one of the Commissioners. And, besides, I think you knew how to spell them, and failed because of the natural

timidity and modesty which is the glory of your sex. I had rather see a girl misspell an hundred words through modest embarrassment than see her spell a whole dictionary of words correctly, she lacking in that quality which so highly adorns woman and which renders her the object of our love and admiration.

In one of the selections read to us it is said "there are nights without a star and no days without a cloud." There have been times in the past when the Indian nights were without stars, and when the whole heavens above were dark with black and threatening clouds, but I feel glad to be able to say to you that it will be so no more. On this reservation the Indian problem will be solved at last. Here it is demonstrated that the Indians can work, and are willing to work and make a living for themselves, their wives, and their children, and that Indian children can stand side by side with the children of the Anglo-Saxons and compete with them in the race for knowledge and learning. The stars are beginning to appear in your heaven and the clouds are rolling by; even now the silver lining appears, and the glorious light of reason, science, and religion will ere long include your race in its broad scope and shed its benign rays on your humble homes.

At the appointed hour the Indians met us on the following morning; nearly the whole mail adult population were present. On the appearance of the Commissioners every Indian arose and stood uncovered until the Commissioners were seated.

Father Carnano was requested to open the deliberations with prayer.

The father stepped forward and every Indian dropped on his knees. A short and fervent prayer was offered, to which the Indians responded.

Judge Wright then addressed the Indians, fully informing them of the object of the visit. He gave them a vivid picture of the unhappy condition of their brethern the Spokanes, explaining to them the nature and terms of the agreement which the Spokane Indians had entered into to remove to the Coeur d'Alene Reservation. He also explained to them that their reservation was greatly desired by others, and how important it was that it should be occupied by Indians, and asked them to give their consent that the Spokanes and other scattered tribes should come on their reservation. He also spoke of the loss of their lands and its occupation by the white men; asked them to speak out freely on all these and any other questions of interest which might suggest itself to their minds.

Dr. Daniels addressed them. He said he had been engaged in transacting business with the Indians for many years. He assured them of the good wishes of the Government, and stated that the Commissioners would endeavor in an earnest way to advance their interests and make them prosperous and contented.

Chief Seltice arose and stated that what had been said made his heart glad; that he had waited anxiously for the coming of the Commissioners; that his people would listen attentively to any propositions which the Commissioners might be pleased to make and give them careful consideration; that his people would meet at night and talk together, and meet us again the next morning.

Judge Wright informed them that an agreement had been prepared, which would be read article by article, and fully interpreted and explained to them.

Before this was done Commissioner Andrews addressed the Indians in plain and earnest language, commending them for their industrious habits and friendly feeling toward the whites. He said he was surprised as well as delighted at the progress they were making, and predicted a bright and glorious future for them. At the conclusion of Commissioner Andrew's speech the Indians manifested their approval by their peculiar shout and clapping of hands. Chief Seltice in a few well-chosen words thanked, in the name of his people, the Commissioner for his words of encouragement and advice.

The agreement was then read to them by Commissioner Andrews, and each section carefully interpreted, to which the Indians gave marked evidence of approval.

Chief Seltice and his people manifested great concern about the future of their reservation. The clamor of the whites for the opening of the reservation had reached their ears and made their hearts heavy. The fact that all their land since this reservation had been taken from them without even the pretense of the asking, and the rapid increase of white settlers around them were calculated to arouse their fears. They had no treaty relations with the Government and had no assurances of its fostering care. The visit of the Commission, and more especially when it was known that its visit was of the most friendly character, filled their hearts with gratitude and

hope, which were manifested in their faces, their tone, and their expressions.

When assurances were given them that they would be protected by the Government in their homes and reservation their gratitude knew no bounds, and it is the sincere belief of the Commissioners that Chief Seltice and every able-bodied man of his tribe could be relied on in any emergency in the defense of the flag and the country with as much certainty as any community in the Union. This is strong language, but it is true. Whilst we cannot speak so confidently of the other tribes and bands visited by the Commissioners, we express the confident opinion that our visit and negotiations with other tribes have greatly strengthened their respect for and confidence in the Government.

On the next day the agreement was again read over and explained, when the chief who had been empowered to speak for the tribe announced that he and his people were ready to sign the agreement. Every man in the council followed, and over two-thirds of the male adults signed the agreement, and it was apparent that all would have done so had they been present.

The agreement was concluded at De Smet Mission, March 26, 1887. By its terms, for a consideration, the Indians cede, grant, relinquish, and quitclaim to the United States all right, title, and claim which they now have or ever had to all lands except that included within the boundaries of the present Coeur d'Alene Reservation.

The lands which they claimed, and held by occupancy, contained about 4,000,000 acres. They had the same title to it which other Indians had, that is, the fee in

the United States, and the occupancy, with all its incidental right, in the Indian. The right of the Indians to their occupancy is as sacred as that of the United States to the fee.

They had been despoiled of this right without compensation from any source. Our instructions clearly contemplate a settlement of the claim based on the loss of these lands, and we were referred to Senate Ex. Doc. No. 122, Forty-ninth Congress, first session, which we examined with great care and attention.

On page 9 of this document will be found the petition of the Coeur d'Alene Indians, addressed to the President of the United States, setting forth their claim and the boundaries of the land in question. This country, as the petition alleges, "is one of the most valuable in Washington Territory, dotted by numerous and valuable wheat farms, valuable forests of timber, saw-mills, gold, silver, and lead mines, the military post at Coeur d'Alene, and numerous thriving towns and villages. The Northern Pacific Railroad runs directly through it, and much of the land owned by that corporation was the land of these Indians.

The history of the failure of Governor Isaac J. Stevens in 1855 to meet and negotiate with these Indians is well known to the country.

At De Smit Mission we were furnished with the original agreement made and concluded on the 28th day of July, 1873, at Lutah or Hangman Creek, in the Territory of Idaho, by and between John P. C. Shanks, John B. Monterth, and T. W. Bennett, special commissioners on the part of the Government of the United States, and the

chiefs and headmen of the tribe of Coeur d'Alene Indians.

We had a copy of said agreement prepared and herewith submit the same as part of this report.

Reference is made to this paper and also to the fact that these Indians were recognized by the Government in 1855, as being entitled to consideration when Governor Stevens was constituted a commissioner to deal with certain northwestern tribes in order to show that their claim to compensation had been heretofore entertained. By reference to the copy of the agreement, it will be observed provision was made for a reservation for the Coeur d'Alenes out of a portion of these lands, and the tribe relinquished to the Government *all lands heretofore claimed by them lying and being outside of said described reservation.* The boundaries are then given in detail, and it will be found that they substantially agree with the boundaries given in the petition of the Indians.

As a consideration for the above cession it was agreed that they should be paid for improvements made on the lands lying in Washington Territory in case by survey of the line they were found to be in that Territory. In addition, the Government agreed to furnish the Indians with 10 wagons, (2-horse), 10 sets of harness, 5 sets plow harness, 50 plows, 10 pair American mares, 10 whip-saws, 10 cross-cutsaws, 2 mowers, 2 mowers and reapers combined, 1 set blacksmith's tools, 2 one-horse rakes, 20 harrows, 10 grain cradles, to construct one saw and grist mill, to build a school-house with apartments for males and females, one boarding and lodging house, one smith's shop, and in addition to all this the United

States agreed to fund in United States 4 per cent bonds the sum of $170,000, interest to be paid annually for the benefit of the Indians, with right on the part of the United States of paying the principal at any time after 20 days.

This agreement was formally signed by three commissioners and witnessed by R. B. Whitman and T. M. Cataldo, S. J., and by all the chiefs and headmen of the Coeur d'Alene tribe.

At the time we had no means of ascertaining whether this agreement was submitted to Congress for its ratification, as was provided for therein. It was of service, however, in aiding us to what amount of compensation should be given as consideration for the lost lands. The amount necessary to fulfill the stipulations of this unratified agreement is larger than that which your Commission agreed to give in this one.

The third article of our agreement gives the consent of the Coeur d'Alenes to the removal to their reservation of the Spokane Indians, in accordance with the terms provided in the agreement with the Spokanes and the fourth article, that the Calispels and any other non-reservation Indians may also be removed to that reservation.

The anxiety of the Indians about their reservation and their fears that it might in some way be taken away from them, their unexampled good conduct, their friendship for the neighboring whites, displayed on a late memorable occasion, their rapid advancement in self-support and civilization unaided by the Government, their willingness to allow their reservation to be filled up with Indians, the confidence they repose in the Government to settle their claim on its own terms, all conspired to cause

us to put in the fifth clause, which provides that their reservation shall be held forever as Indian land as homes for the Coeur d'Alenes and such other Indians as may be removed thereto, and that no part of the reservation shall ever be sold or occupied, open to white settlement, or otherwise disposed of without the consent of the Indians.

It may be said that this was unnecessary, inasmuch as no such thing would happen; but the loss of their former possessions and other causes had so excited their fears that it was concluded, in order to allay suspicion, and in as strong a manner as possible, bind the Government to that good faith which the Indian prizes so highly and which he thinks has been violated so frequently.

Article 6 provides that the sum of $150,000 shall be expended under the direction of the Secretary of the interior, as follows:

For the first year, $30,000; and for each succeeding year for fifteen years, $8,000.

These Indians had everything which [illegible] or wanted, or if not it was within their power to procure it, except a [illegible]. It was agreed that the construction of this should be the first item of the expenditure, the cost of this to come out of the $30,000, together with the pay of the engineer and miller. For the probable cost of the mill we beg leave to refer to our report as to the Spokane Indians. The balance of the money provided for is to be expended in such useful and necessary articles as shall best promote the progress, civilization, comfort, improvement, and education of the Coeur d'Alenes.

Article 7 deserves some comment and explanation. When it was ascertained that these Indians really needed and desired nothing in the way of clothing, food, agricultural implements, or school facilities it became a question with the Commission as to the method proper to be pursued in the payment of the amount in satisfaction of the claim. From information derived from the best and most reliable sources we learned that the police regulations were of the highest order, which results in excluding ardent spirits from the reservation; and that long experience in self-reliance and traffic with the neighboring whites had made them cautious, shrewd, and provident in the use of money. We learned that their trade in one town adjacent to the reservation amounted to about $25,000 yearly. We therefore conclude that justice requires us to recognize these qualities and facts and adapt our course to the advanced condition of the Indians. Hence it is provided in this article 7 that if it shall appear to the satisfaction of the Secretary of the Interior that in case the Indians need none of the money expended as provided in article 6, they being already provided with such things, and further, that they will judiciously use the money, the same may be paid to them in cash pro rata. It will cost the Government no more to pay in cash than in supplies, and, besides, the trouble will be much diminished.

All money not expended in any one year, according to the provisions of the agreement, is to be kept for the use of the tribe, and that the wishes and needs of the Indians are to be consulted when purchases are made for them.

In the employment of engineers, millers, mechanics, and laborers of every kind preference is to be given to

Indians qualified to perform the work, and all persons employed are required to teach the Indians these trades and vocations. We were assured that in a short time Indians on the reservation would be fully qualified to do all these things, and we considered this an important provision, tending to their rapid self-support.

It was further agreed that the United States would furnish a competent physician and medicines, a blacksmith, and a carpenter.

Article 12 makes provision as to marriages between Indian women and white men similar to that made by the Commission with the Chippewas of Minnesota.

This provision and the one allowing certain white men, four in number, who have married Indian women and who are now residing on the reservation, was embodied in the agreement at the special insistence and request of the tribe.

As to article 13, it is proper to state that this was also embodied at the earnest request of the entire tribe.

The fathers who went among these Indians at an early day found them a fierce, wild, and ignorant people in their aboriginal state, and have, by patience, toil, and care brought them to their present advanced state of Christianity and civilization. A better ordered and better behaved Indian community can nowhere be found. They are active, industrious, thrifty, and self-supporting. Their respect for the law, their loyalty to the country, and devotion to religious principles and practices are greatly to be commended. All this they attribute to the work of the fathers, who have expended in building of churches,

school-houses, and other buildings, opening and fencing farms, not less than $20,000. On these farms the Indians have learned the art and science of agriculture. Both schools, male and female, are filled with Indian children walking in the same path, not only receiving good educations but learning all the practical duties of life.

As has been stated before, the chief matters of concern which occupied their minds was the preservation of their homes and the perpetuation of their church and school facilities.

It appeared that they had years ago given their consent to the provision contained in this article, and wishing it embraced in a more lasting and durable form they requested the insertion of that part of the agreement.

With all the facts before the Commission, and being on the ground, we deemed it of the highest importance to the Indians and their posterity that this arrangement should be made. It will be seen that the title in fee is not touched, and that the right of use of all that is conceded, or in other words, to use the expressive language of the Indians, they simply "lend the land" in order to secure the education and civilization of their children.

After concluding our labors with the Coeur d'Alenes we returned to Spokane Falls in order to arrange for a visit to the Calispels or Lower Pend d'Oreilles.

* * *

This completed all the work assigned us, and we left immediately for Duluth and from thence proceeded to this city.

We were instructed not to delay on our route for the purpose of making a final report, but only to make short reports by telegram as the work progressed.

On our arrival in Washington we had to arrange and classify the papers, write out from notes full proceedings of the councils with the various tribes, and make a full and final report of our entire work from the date at which Commissioner H. W. Andrews joined the Commission.

We have endeavored to make the report in such a manner as to give our reasons for each article of the agreements and to give such information with regard to the condition of the Indians and their respective reservations as might be useful in future dealings with them.

If these agreements shall be ratified by Congress and be carried into effect in good faith it is confidently believed that the Indians will soon arrive at a position in which they may be self-supporting and cease to be a burden on the Government. That Indians can be taught to work and made to do it as cheerfully and willingly as other people has been demonstrated, and what has been done can be done again.

The Commissioners had their first meeting in Saint Paul, Minn., about the 1st of August, 1886.

They entered at once upon the discharge of the arduous, important, and delicate duties intrusted to them. From that time until the present they have been constantly engaged in traveling and counseling with various tribes of Indians with whom they were instructed to hold negotiations. They have visited in all thirty-one

bands of Indians, residing in Minnesota, Dakota, Montana, and Idaho and Washington Territories. Most of these bands live at different places and widely separated one from another; many of them are wild and live a roaming life and are not on reservations. To reach them has required an amount of travel rarely accomplished considering the seasons and conditions of transportation. Much of the time they slept on the ground, sometimes without even the covering of a tent. They traveled perhaps as much as 7,000 miles by rail, several hundred miles in road wagons, near 400 miles by lakes and rivers, much of this in frail birch-bark canoes propelled by Indians, and 1,500 miles in open sleighs over vast plains of snow when the thermometer ranged from zero to 60 degrees below.

Of the thirty-one bands treated with they failed to make negotiations with but four bands, and one of these was found to be in such a good condition that the Commissioners did not press their propositions, and in one more it is questionable whether it was desirable that the propositions should have been accepted.

In most instances the consent of a large majority of the tribes and bands was voluntarily given after the widest and most intelligent discussions were had. In the case where the majority was not obtained the full consent of the chiefs and head-men was given in open council, with the full knowledge and consent of the tribes, or a majority thereof, and in accordance with the practice of treaties with them.

By the terms of the various agreements the Indians have been justly dealt with, ample provisions made for

their support, education, civilization, and final self-support, and it is believed that upon the ratification of the several agreements negotiated, the Indian title or claim to between twenty-five and thirty million acres of land will have been extinguished either by direct cession or to be disposed of as in the respective agreements provided, all of which now lies idle and unproductive, and which contains millions of treasure in the form of timber and valuable and precious metals.

Right of way through various reservations has been obtained, by which wagon-roads and railroads can be constructed.

Lastly, the various bands and tribes have been made to rely on the sense of justice and kindly intentions which pervade the breasts of those who have the control and management of Indian affairs, and the opinion is confidently entertained by your Commissioners that at every point which they have visited the feeling toward the Government among the Indians is one of trust, confidence, and respect.

The Commissioners have at all times faithfully endeavored to follow the instructions given them, and in all things to carry out the expressed humane policy of the Government toward the Indians.

In dealing with so many bands and tribes of Indians differently situated, in different stages of civilization, some wild and barbarous, some half civilized, and few with as high degree of civilization as is likely to be reached by Government aid, it was to be expected that some mistakes would be made; but the Commissioners are conscious of no omission on their part of an honest

endeavor to do strict justice to the Indians, having due regard for the honor and dignity of the Government and the rights of the white people.

As was promised us in our instructions, the Department has at all times and in all things given us its earnest and efficient support.

Before leaving his home in Minnesota, Commissioner Daniels authorized his name to be signed to the final report by the other Commissioners.

All of which is respectfully submitted.

JNO. V. WRIGHT,
HENRY W. ANDREWS,
JARED W. DANIELS,
Commissioners.

* * *

Agreement with Coeur d'Alene

This agreement made pursuant to an item in the act of Congress entitled "An act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the year ending June 30, 1887, and for other purposes," approved May 15, 1886, by John V. Wright, Jarred W. Daniels, and Henry W. Andrews, duly appointed Commissioners on the part of the United States, and the Coeur d'Alene tribe of Indians, now residing on the Coeur d'Alene Reservation, in the Territory of Idaho, by their chiefs, head-men, and other male adults, whose names are hereunto subscribed, they being duly authorized to act in the premises, witnesseth:

ARTICLE 1.

Whereas said Coeur d'Alene Indians were formerly possessed of a large and valuable tract of land lying in the Territories of Washington, Idaho, and Montana, and whereas said Indians have never ceded the same to the United States, but the same, with the exception of the present Coeur d'Alene Reservation, is held by the United States and settlers and owners deriving title from the United States, and whereas said Indians have received no compensation for said land from the United States: Therefore,

ARTICLE 2.

For the consideration hereinafter stated the said Coeur d'Alene Indians hereby cede, grant, relinquish, and quitclaim to the United States all right, title, and claim which they now have, or ever had, to all lands in said Territories and elsewhere, except the portion of land within the boundaries of their present reservation in the Territory of Idaho, known as the Coeur d'Alene Reservation.

ARTICLE 3.

The said Coeur d'Alene Indians agree and consent that the Upper and Middle bands of Spokane Indians residing in and around Spokane Falls, in the territory of Washington, may be removed to the Coeur d'Alene Reservation and settled thereon in permanent homes on the terms and conditions contained in an agreement made and entered into by and between John V. Wright, Jarred

W. Daniels, and Henry W. Andrews. Commissioners on the part of the United States and said Spokane Indians, concluded on the 15th day of March, 1887, at the Spokane Falls, in the Territory of Washington.

ARTICLE 4.

And it is further agreed that the tribe or band of Indians known as Calispels, now residing in the Calispels Valley, Washington Territory, and any other band of non-reservation Indians now belonging to the Colville Indian Agency, may be removed to the Coeur d'Alene Reservation by the United States, on such terms as may be mutually agreed on by the United States and any such tribes or bands.

ARTICLE 5.

In consideration of the foregoing cession and agreements, it is agreed that the Coeur d'Alene Reservation shall be held forever as Indian land and as homes for the Coeur d'Alene Indians, now residing on said reservation, and the Spokane or other Indians who may be removed to said reservation under this agreement, and their posterity; and no part of said reservation shall ever be sold, occupied, open to white settlement, or otherwise disposed of without the consent of the Indians residing on said reservation.

ARTICLE 6.

And it is further agreed that the United States will expend for the benefit of said Coeur d'Alene Indians the

sum of one hundred and fifty thousand dollars, to be expended under the direction of the Secretary of the Interior, as follows: For the first year, thirty thousand dollars, and for each succeeding year for fifteen years, eight thousand dollars. As soon as possible after the ratification of this agreement by Congress, there shall be erected on said reservation a saw and grist mill, to be operated by steam, and an engineer and miller employed, the expenses of building said mill and paying the engineer and miller to be paid out of the funds herein provided. The remaining portion of said thirty thousand dollars, if any, and the other annual payments shall be expended in the purchase of such useful and necessary articles as shall best promote the progress, comfort, improvement, education, and civilization of said Coeur d'Alene Indians, parties hereto.

ARTICLE 7.

It is further agreed that if it shall appear to the satisfaction of the Secretary of the Interior that in any year in which payments are to be made as herein provided said Coeur d'Alene Indians are supplied with such useful and necessary articles and do not need the same, and that they will judiciously use the money, then said payment shall be made to them in cash.

ARTICLE 8.

It is further agreed that any money which shall not be used in the purchase of such necessary articles or paid over, as provided in article 7, shall be placed in the Treasury of the United States to the credit of the said

Coeur d'Alene Indians, parties hereto, and expended for their benefit, or paid over to them, as provided in the foregoing articles.

ARTICLE 9.

It is further agreed that in the purchase for distribution of said articles for the benefit of said Indians the wishes of said Indians shall be consulted as to what useful articles they may need, or whether they need any at all, and their wishes shall govern as far as is just and proper.

ARTICLE 10.

It is further agreed that in the employment of engineers, millers, mechanics, and laborers of every kind, preference shall be given in all cases to Indians, parties hereto, qualified to perform the work and labor, and it shall be the duty of all millers, engineers, and mechanics to teach all Indians placed under their charge their trades and vocations.

ARTICLE 11.

It is further agreed that in addition to the amount heretofore provided for the benefits of said Coeur d'Alene Indians the United States, at its own expense, will furnish and employ for the benefit of said Indians on said reservation a competent physician, medicines, a blacksmith, and carpenter.

ARTICLE 12.

In order to protect the morals and property of the Indians, parties hereto, no female of the Coeur d'Alene tribe shall be allowed to marry any white man unless, before said marriage is solemnized, said white man shall give such evidence of his character for morality and industry as shall satisfy the agent in charge, the minister in charge, and the chief of the tribe that he is a fit person to reside among the Indians; and it is further agreed that Stephen E. Liberty, Joseph Peavy, Patrick Nixon, and Julien Boutellier, white men who have married Indian women and with their families reside on the Coeur d'Alene Reservation, are permitted to remain thereon, they being subject, however, to all laws, rules, and regulations of the Commissioner of Indian Affairs applicable to Indian reservations.

ARTICLE 13.

It is further agreed and understood that in consideration of the amount expended in buildings and other improvements on said Coeur d'Alene Reservation for religious and educational purposes by the De Smet Mission, and valuable services in the education and moral training of children on said reservation, and in consideration that the Indians, parties hereto, have donated for said purposes one section of land on which is situated the boys' school, one section on which is situated the girls' school, and one section of timbered land for the use of the schools, that said De Smet Mission and its successors may continue to hold and use said three sections of land and the buildings and improvements thereon so long as the

same shall be used by De Smet Mission and its successors for religious and educational purposes.

ARTICLE 14.

This agreement shall not be binding on either party until ratified by Congress.

In testimony whereof the said John V. Wright, Jarred W. Daniels, and Henry W. Andrews, on the part of the United States, and the chiefs, headmen, and other adult Indians, on the part of the Indians, parties hereto, have hereunto set their hands and affixed their seals.

Done at De Smet Mission, on the Coeur d'Alene Reservation in the Territory of Idaho, on this the twenty-sixth day of March, in the year of our Lord one thousand eight hundred and eighty seven.

JOHN V. WRIGHT. [SEAL]
JARRED W. DANIELS. [SEAL]
HENRY W. ANDREWS. [SEAL]

Signed with an x mark and seal:

Chief Andrew Lettice, Regis, Pierre Welsholque, Edward, Damas, Vincent, Paul Reni, Charles Louis, Elimo Spokane Wenceslas, Pierre Chiarpa, Pierre Bartholomewie, Bernard Speqmilks, Louis Sguchau, Eneas Chteshi, Timothy Poloskanh, Alexis, Adrian Umas, Sebastian, Camille, Eneas Nchiesu, Luke Nugani, Hilarous, Basil Kasitquizuit, Joshua, Fidele, Prosper Ntimilps, Alphonse, Paul Tehkanise, Pierre Joseph, Daniel, Eneas Temulian, Louis Stanislaus-Barnaby, Etienne Sinkols, Frisby Niselmakomistanegalm, Tibuce Silosket, Anthony Seme, Charles Augustus, Leo

Achetope, Etienne Stakamski, Lee Kuimchilsile, Thomas Guissunge, Cornelius Quiquilel, Louis Schumukuimo, Andrian Milmilagan, Alexander Chileheko, Adrian Schizikue, Pierre Joseph Schezi, Semo Chimineme, Joseph Karlimkue, Louis Michael Welgolchin, Michel, Pierre Joseph Schaike, Benoit Schulilize, Louis Sebastian Kutilkuku, Adrian Kuzalchau, Joseph Nkonoqua, Isadore Npapskue, Charles Polatkin, Ænead Basil, Andrew Ologazu, Moses Mogzela, Peirre Paul Koipe, Beniot Schilzispo, Louis Malkapsie, Daniel Quipemose, Les Nzakakalipeaga, Æneas Paul Mguiakan, Louis Lolo, Franeois Nsispikua Nkaisis, Francois, Eugene, Felicien, Pierre Basil Lanwasket, Leo Tempilime, Louis Nimuse, Louis Lotone, Stanislaus, Nickodemus Kruto, Louis Sepas, Payuse Williniseme, Louis Scisqonachan, Phillip Pokatchan, Joseph, Peter Paul, Stephen.

BENJAMIN S. MORE,
Agent.

Witnesses:
SYDNEY D. WATERS.
JOHN P. SWENEY.

I, Robert Felt, U. S. Indian interpreter for the Colville Indian Agency, W. T., do hereby certify on honor that the foregoing agreement was carefully read and fully explained to the Indians in open council and by the correctly interpreted, and that the contents thereof was fully understood by said Indians before the signing and sealing of the same.

ROBERT his + mark EKLT.

Witness:

A. C. KING,

Dated DE SMET MISSION, COEUR D'ALENE RESERVATION.

IDAHO TERR'Y, *March* 26, 1887.

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* * *

COUNCIL WITH COEUR D'ALENES.

WEDNESDAY, *March* 23, 1887.

The council met and opened with prayer by Reverend Father Carnano. Present, Commissioners Wright, Daniels, and Andrews, the chiefs and bands of the Coeur d'Alenes, and the interpreter. Judge Wright said:

"My friends, we have traveled a great distance in order to meet you. We thank you most sincerely for the very kind reception you have given us, and for your words of friendly greeting. You are the descendants and representatives of a noble tribe of Indians. You have given up the pursuit of war and of the chase and are devoting all your energies to the arts of peace: you are striving manfully to take care of yourselves, your wives, and your children. We have visited your schools and have seen how well your children are being educated. All this we need not tell you. We are well pleased, and particularly when we know that you feel so deep an interest in these matters. It will inspire your friends to renewed efforts. It will strengthen those who are striving to advance you and place you firmly on the road to civilization and independence. Those who sent us here will be

glad to hear all this. Your condition and the character of your reservation we had heard of before our coming, but it is better than had been told us. You are known to be a people who are of rising intelligence and in all the pursuits of peace; that you have been friendly toward your white neighbors, and that you have given them assistance in times of danger and trouble, is known and appreciated. It is also known that you claim to have once possessed a large body of land, that much of it has been settled by white people, that you had never ceded it away, and that you have received nothing for it. You have a good reservation which you wish to preserve for yourselves and your children. The Great Father desires that this shall be done. You have good farms, fences, and houses, agricultural implements and stock, and we learn that you are working men, that you cultivate your farms and make good crops. We come with kind words from the Great Father. We do not come to force you to do anything. We come to ask your consent. We bring no soldiers, but only words of kindness and praise. We will speak plainly so that you can understand us, and we wish you to agree to nothing until you understand it, and not then unless your minds and hearts are willing.

"Your brethren, the Spokanes, for years have been living about the falls. The white people have gone there and settled all over their country. These Indians are very poor and unhappy. They have no lands and no homes. The Great Father has pity on them, and he wishes to place them on a better country. He wishes also that you will have pity for the Spokanes.

"In 1885 the Government sent Governor Stevens and some other Commissioners to visit and treat with the

Indians in this part of the country, and, among others, he was instructed to visit the Spokanes and the Coeur d'Alenes. Governor Stevens made an honest endeavor to see them and you, and to buy your lands, but he was prevented from doing so by an Indian war which broke out about that time. I could not explain to you why no other commission was sent. It is enough to say, that it was not because the Government cares nothing for the Spokanes or you, for it is true that the condition of the Spokanes has long been a matter of much concern. We have just left the Spokanes. We were with them in council for many days. They were slow to understand, but after a while we succeeded in making an agreement with them by which we hope to remedy their wrongs and bring them to a better condition. In order to do this we need the helping hand of you, the Coeur d'Alenes, and we come to ask that help from you. The President desires that they shall have houses, farms, agricultural implements, and help in other ways as a recompense for their lost country. He wishes that they all may be removed to this reservation by your consent. It is believed that by bringing them here and locating them on farms on this reservation they will soon be in the good condition we find you. If they stay where they are it is feared that they will be ruined. Some of the whites among them are friendly to them, but some give them whisky and cards, and they are leading a bad life, and have much trouble in getting along. We think that it will not only be an act of kindness on your part to allow these poor people to come and live with you, but we also believe it will be the best for you. It is known to you that the whites much desire to get your reservation, or some of it. The whites are increasing in

numbers rapidly and they are clamorous for more land. It is not right that large bodies of good land should lie idle and uncultivated. It must be worked either by white people or by Indians. If your reservation was full of Indians the whites would not want it, or ask for it. Already we have been asked to open this reservation to white settlement. Long petitions came to us while we were at Spokane Falls asking that this be done. We told them no, we have no power to do that: we came to put other Indians there who have no homes. Now you can see that we come as your friends, and we wish you to think of these things and speak freely to us. We wish to take as little of your time as possible, as we know you are farmers, and that you are needed at home. The time we will leave to you judgment. We wish also to hear from you on the subject of your lands about which you wrote to the President in your petition. We wish also to hear from you as to your wants and necessities. We wish every question fully discussed and well understood. We see you are sensible men and disposed to do right, and we think you will have but little trouble in coming to a just conclusion.

"This business is not entirely new to us. We have visited many Indians in other places and have made agreements with them. Each of us has had experience. My friend Major Andrews, has been in the Indian office, and Dr. Daniel has been much among Indians. We are all pleased at what we have seen among you. We have seen that Indian children can learn what white children can, and that you are as good farmers as white men under the same circumstances. We are anxious to do that which is right for you. We wish to see you have justice and to

improve your condition. As for myself, I can say with truth that my anxiety to succeed in our efforts to improve the condition of the Indians is greater than I ever felt in any public employment of my life."

Dr. DANIELS. My friends, the judge has said nearly all I can say. I have been a long time among the Indians. At the same time, when Governor Stevens came to this country the judge was a member of the Great Council at Washington, and I was appointed to go among the Indians. When first I went among the Indians they had as food the wild meat of the buffalo; now I see you on good farms and in your happy homes. I have seen a great many Indians, but I did not expect to see them ahead of the whites as I see them here.

You have the finest schools, the best community that I have seen among Indians, and we are well pleased. We can talk to you as we can to the whites and do business with you as with them. We are all very glad to see you."

Chief SELTICE. All right, I will assure you; you have come from afar, and our hearts are all glad to-day. We have wanted to see you; we have not doubted our Great Father, but always believed that, though he was a great ways off beyond the mountains, yet he would see us and remember us, his children; my heart is big to-day, and my people are pleased at your coming, and I am glad also. Tell us what you desire us to do, and we will do it gladly, willingly. We will try to do what is right: we are as children: yet the Great Father has us under his protection, and you promise to help us. We want your advice; we want your counsel and help. For this we thank you. I have little to say to-day and do not wish to make any

mistakes. We wish to consider. You have spoken to us about the Spokanes. We are very sorry for them, and we will do all in our power to better their condition. We have heard that many of them wish to come on this reservation; our people will be well pleased if they will all come. I learn that they have two ideas; they are not as one, but I believe we can make them as one, so that they will all come here: we will try to gain their affections: we believe that they will be as one among us. You say you are well pleased at what we have done in the past: we are glad. We try to do that which will please our Great Father. You have seen our schools and you speak words of kindness and encouragement. We wish these schools to remain always with us. What we have promised the fathers and sisters before, we wish continued. These fathers have labored faithfully among us in teaching our children: we wish what we have promised them confirmed by the Great Council, so that we will feel secure in our schools. We think you can help us in that which we ask for; you can do what we want. We will talk more of this.

Judge WRIGHT. Do you wish to talk to us about your lands mentioned in your petition of two years ago?

SELTICE. We wish you to talk first and then we will answer you.

Judge WRIGHT. The paper which I hold in my hand [Senate document] sets out fully your claim: in that petition you say your boundary was as follows: Commencing at Steptoo Butte, runs northwest to Antoine Plants on the Spokane River, thence to the Pend d'Oreille Lake, thence to the summit of the Coeur d'Alene Mountain, thence south to the most southern thereof whence flow the

waters of the Palouse River, thence west along the southern rim of the water-shed of the Palouse River to the beginning.

We wish to do right about the claim: that was one purpose for which we were sent to you. On yesterday I omitted to say anything about your promise to the fathers concerning the schools. We will consider this and do all we can to satisfy your desire. You do well in appreciating your schools. If the advantages which your children enjoy had been given you it is plain that it would have aided you very much. When your children grow up to be men and women the advantages derived from these schools will be seen and felt. It will enable them to compete with the white people in the affairs of life. We will consider what is best to be done.

SELTICE. We are pleased at what you say; we know it to be good. Our chiefs have not talked together, but what we said in our petition two years ago we wish fixed: we wish that which we promised carried into effect with the fathers and sisters, for with us they will be always. This is the great desire of our hearts.

VINCENT Old Chief. A long time ago I was not such as you see me now: I am old. I am glad of what you are doing. It is good. I think there are two things. One is from the father and one is from you. These two things we have gained. The fathers tell us we have souls, and that we can go to heaven. This is one thing. I am talking to you only now, but many have my heart. The Spirit has care of my soul, and you of my body. I know that through you our country is saved, and from you we have found things to eat, because you have taught us how to get our food. The

Coeur d'Alenes are getting along well, and you have brought us to this; you have saved our land where we are, and this we owe to the Government.

SELTICE. The land outside this reservation has been taken up by the whites and we had forgotten it until two years ago, when we remembered it: and then we sent our petition to the Government at Washington setting forth our desires. You Gentlemen will tell us what to do, and now we will listen to any proposition you may have to make.

Judge WRIGHT. Is the land you are now living on a part of the country you speak of in your petition?

SELTICE. Yes, certainly. This is the middle of it. That which was taken lies outside all around this.

Judge WRIGHT. In you petition you say you need a saw and grist mill; mechanics to teach you trades: cattle and sheep.

SELTICE. It was a saw-mill and flour-mill.

Judge WRIGHT. Do you people need wagons?

SELTICE [after consulting with chiefs]. No: we do not need these, because we have them.

Judge WRIGHT. We believe you to be reasonable men, and we think we can pull together with you like two well-broken horses. To-morrow we will meet again. What you say is plain and frank, and it gives us pleasure. The kind manner in which you speak of the Spokane Indians, and your consent to their coming and living with you, does you honor. They can be saved by bringing them here. They will be ruined if they remain where they are.

The Great Father will be pleased when he hears your kind words. It will make him feel kindly towards you.

THURSDAY, *March* 25.

Commissioner ANDREWS. Perhaps it may be well for me to say a few words to you this morning before proceeding to the business which has called us together, in order that you may be permitted to judge of the feelings which control me as well as the feelings of my two associates who addressed you on yesterday.

I, too, am the friend of the Indian, and as such friend have been sent by the honorable Secretary of the Interior, the honorable Commissioner of Indian Affairs, and by the Great Council of the United States from the seat of Government at Washington, 3,000 miles away, to this beautiful spot, the Coeur d'Alene Reserve, in the Territory of Idaho, to visit you and assist in righting the wrongs which you and your friends say have been inflicted upon you. And now, right here, I want you to understand that we were not sent on account of our great ability to deal with Indians, but because we have proved to the Great Father upon more than one occasion that we are the friends of the red man, and that we held his rights as sacred as that of any white, black, or red man on earth. We have been commissioned to treat with you upon high and holy grounds; to give you all the rights ever accorded to any people by the wisest government on earth. We were told by the Great Father of your advancement in civilization, but little did we expect to see what we now see. Little did we expect to find you occupying the finest lands of the great West – well watered well timbered, surrounded by all things to make life happy, with the best

schools we have ever seen anywhere, with children that can teach more than half of the Government clerks in Washington how to read and write. And last, though not least, little did we expect to find such good men of God as your best earthly friends. The good fathers here are constantly looking after your welfare here and preparing your souls for the world to come. When we report all these things on the Great Father in Washington it will make his heart glad, and he will exclaim: "Long life to the Coeur d'Alene of Idaho." I shall tell him that the brand of strong drink does not disfigure the face of a single Coeur d'Alene: that not an eye is dimmed by its damnable sting; that there is not an inch of the Coeur d'Alene Reserve poor enough for a whisky-seller to place his unholy foot. And, lastly, I will tell him that my prayer to Almighty God was, and said aloud in your hearing, that not one drop of strong drink should ever enter the throat of a Coeur d'Alene Indian. Take this from a friend, and with such a promise faithfully kept, with such a climate and such lands as you own, with such teachers as the good fathers and sisters of De Smet Mission, with such a friend as the great Government of the United States to protect and defend you, and, lastly, with such a noble specimen of a true and brave American as Seltice as your chief, you will be the happiest people on earth.

SELTICE. I will assure you now I am glad that you have given us such good advice. I am sorry that the white men have bad habits. We are well pleased with all you have said. You talk to us of goodness and I am glad to hear those words coming from your lips to-day. We will cherish your words in our hearts and remember them always. My heart is well pleased with all you have said.

Judge WRIGHT. Do any of you wish to speak? If so, we will hear you now.

DAMAS (chief). I am going to say a few words only. The chiefs will speak for us; we leave everything to them and whatever they say or do will all be right, as we are all of one heart and mind.

Judge WRIGHT. My friends, since our adjournment on yesterday we have given all the questions which have been discussed our careful attention. We have prepared a paper to be submitted to your council. It will all be carefully read over to you, and interpreted so that all will understand its contents. It may be that some changes will be made. When everything is fully understood by you and an agreement reached, we will have the paper written in ink ready for signing. If in reading over the agreement there is anything you do not fully understand, or any part you wish changed or left out, you can say so.

Commissioner Andrews then read the agreement and it was carefully interpreted. After the reading of the agreement Judge Wright said: If you agree to what is here written it will be submitted to the Great Council and the Great Father for approval. If when they examine it they are pleased with it and think it good for you and good for the Government they will approve it and it will become a law. Should they disapprove it will be as a blank paper. Our duties, then, you see, are of a delicate nature. If we please you we may not please the Government. We must satisfy both or our work amounts to nothing. If the agreement meets your approval and is ratified by Congress it will undoubtedly place you in a condition in which you

can be self-supporting with your present advanced position. You will soon need nothing from the Government but the protection which it gives to all its citizens alike. You will have no use for Government farmers, smiths, doctors, or agents; you can get things without aid.

SELTICE (chief). I will assure you now. It may take me two hours, as you have spoken much. I am glad you have taken the time, for it has not been lost. We have listened very carefully and have understood everything that you have said, and it was good. You have put new life into our veins and made us feel that the Great Father and yourselves are the true friends of our race. We know that we are Indians, yet the same Great Father cares for us all. You have spoken to us of the Spokane Indians and of your great desire to help them. We also desire to see them happy people and that they come on this reservation. Just as the whites have poor relations, so have the Indians too – one on our father's and two on our mother's side, and thus am I related on my ancestors to many tribes in this country, and to them I extend the privilege of settling on our land; and I also ask the privilege of having good half-breeds come also. There is one thing which the whites do which we do not – they marry our women, but we never marry white women.

I have considered everything you have said to us; I have considered well, and we are willing to have all these Indians come, but they must leave their whisky and their cards behind them. They must not bring whisky and cards here. This is for their good and the good of my own people. I do not want any bad people to come here and set my people an evil example. Everything you have said to us is good. One thing you have spoken to us about is

our land, which the whites have taken away from us and which they now occupy. It is lost to us; it is dead to my people. We had almost forgotten it, but it has come back to our minds and we now speak of it. You say we may receive for our lost land $150,000 – for our land outside the reservation. Do you know how much there is of it? There are more than 4,000,000 acres. This land was very dear to us, but we have given it up to the whites. We are on only a small part of our country – I mean this reservation. Here we have made our homes; here we have built our houses; here are our fences, our farms, our schoolhouses, our churches. Here are our wives and our children; here are the graves of our ancestors; here are our hearts; here we have lived, and here we wish to die and be buried. We want these preserved forever.

We understand that the paper which we signed is to go to Washington to be seen by the President and the Great Council. I know your hearts with regard to it, and they are good. However you fix it, it will be right; but I plead with you, I implore you, I call on the Great Father, who will hear me, preserve for us and our children forever this reservation, where are our schools, our churches, our homes, our graves, our hearts. The Government has now thought of our claims for our lost land, and they have sent you to us. Of this we are glad, but neither money nor land outside do we value compared with this reservation. Make the paper strong; make it so strong that we and all Indians living on it shall have it forever. We also wish you to make our schools and our churches so strong that they will be here forever for our children, when we have passed away from the world and gone to the Great Father above. What has been said by you is all

good, and we thank you for it. You have now seen our hearts; they are laid open and made bare before you.

Judge WRIGHT. You have done yourself great honor by your words; we honor and thank you for the words you have spoken. You have shown yourself worthy to be the leader of your people. They ought to feel proud of you. If they will but follow where you lead they will have but little to fear.

We have endeavored to carry out your desires. The Government will protect you and your lands. It will do so if it takes its whole power. It will also protect and encourage your schools.

If none of you desire to say anything more, we will prepare an agreement in writing for your signatures; we wish you all to be present; we will not delay you long.

SELTICE. We will be glad to see you again in the morning. You have the hearts of all my people. We will leave everything to Washington. Fix your hearts good for us also.

FRIDAY, *March* 26, 1887 – 9:30 a.m.

Judge WRIGHT. On yesterday we read to you the terms of a proposed agreement. We have carefully considered all the subjects which were then discussed, and have prepared it in proper form for your signatures, with some few changes which were suggested on yesterday. It is now complete. [Here the agreement was read over, interpreted, and explained.]

Do you now understand all the promises?

SELTICE. Yes; we understand everything you have said.

Judge WRIGHT. When we leave here we will next visit the Calespels, or Lower Pend d'Oreilles, and before visiting them we thought it best to obtain your consent that they might be removed to this reservation. If they conclude to come here this will save the trouble and expense of another visit to you.

SELTICE. How about our agent? Is he to be paid out of the fund provided by the agreement?

Judge WRIGHT. No; the agent will be paid by the government.

SELTICE. All right. We shall not need the sawyer or miller more than a year. By that time we will be able to do the work ourselves. Our people will soon learn to run the mill.

Louis GASTAZTAIN. We are all glad you have come to see us. Since you came I have looked into what you have been saying. You have spoken to us of our country. When they ran the survey of our reservation we thought the land was all lost to us. This has been troubling our minds and the minds at Washington ever since. I did not want to take any money; but we are now all of one mind, and we will take it because it will help us. It is not much for the land which has been taken away from us. We are very poor. We are very near the time when we are to sign the paper. We will take good care of the money. When we first came on this reservation we were poor, and now you see us with homes, our farms all fenced, and cattle grazing on our hills. The fathers have taught us to do this – to

farm and save our money and educate our children. I myself can not read or write; but we are very thankful to the Government for our schools. Some of our people are old, and they would like to have their money paid to them before they die, so they can have some benefit from it. You have seen my heart.

ELIJAH (a Spokane Indian, the only one present wearing a blanket). Is Lots' reservation as good as this?

Major WATERS. No; no part of it can compare with it.

ELIJAH. Then I am coming here, and I will tell all my people to come and take up this land; the Coeur d'Alene are our friends.

Judge WRIGHT. We will sign the paper first and then you can sign. [Here the agreement was signed by the Commissioners and all the Indians. When Nicodemus came up to sign Judge Wright said to him:] I am informed that you were the first Indian on this reservation who took a farm and put a plow in the earth, and I learn that you have done well, and that you are now comfortably situated. Major Waters tells us that you have always set a good example to the Indians, and that hundreds have followed your advice and example. For this you deserve well, and you should be remembered and encouraged.

NICODEMUS. As soon as I began to plow I began to see food and money. I thank you for your words.

Judge WRIGHT. I believe all have signed. A large majority of the tribe have signed the agreement, and those who are not here would sign if they were present. When you tell the absent ones what you have done they will be well pleased. You have behaved well. You have

shown your confidence in the Great Father and it will give us pleasure to say that you deserve well of the Government. Your consent that the other Indians not so well off may come on your reservation speaks well for your hearts. Your matters are in a good condition. You are on the right road. Be at peace with one another and your neighbors. In all your transactions as a tribe remain reunited. This will give you strength. Advise the Spokanes to come. When they come treat them kindly. If they have faults, pity them and lead them in the right way. Treat them as the Great Father above treats us in mercy. Call them from their evil ways and make them as you are.

ADRIAN UMAS. I am glad you have talked to us from the law. You have made our homes secure. When we are sick the priests hold us in their hands and bring us to heaven. You have told us the truth.

SELTICE. You are now going to leave us and go back to Washington. When you go away do not forget us. Our brains are big and we have put away your words in a safe place. We shall remember them always. We shall not forget you nor your words. We are only Indians. We are not so high in knowledge as you are, but your words of advice make us even with you. Your coming has done us all good. We looked for your coming for many days. Sometimes we feared you would forget us and pass us by. Major Waters did not deceive us; he told us to be patient and you would come. We ask you to take back to the Great Father our humble expressions of peace and good will. The Coeur d'Alenes will ever be his friends. You have lifted a heavy load from our hearts. We take courage and a new start. Our land, or homes, our schools are to be

ours forever. All this we feel is from your coming. In the name of my chiefs and my people I thank you.

* * *

No. 00-189

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In The

Supreme Court of the United States

STATE OF IDAHO,

Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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HOUSE OF REPRESENTATIVES

51st CONGRESS, *1st Session.*

REPORT No. 1109.

RATIFICATION OF COEUR D'ALENE INDIAN TREATIES IN IDAHO.

March 28, 1890, – Committed to the Committee of the Whole House on the state of the Union and ordered to be printed.

Mr. Du Bois, from the Committee on Indian Affairs, submitted the following

REPORT:

[To accompany H. R. 7703.]

The Committee on Indian Affairs, to whom was referred the bill (H. R. 7703) "to ratify and confirm certain agreements with the Coeur d'Alene Indians in Idaho Territory, and to make the necessary appropriations for carrying the same into effect, and for other purposes therein named," having had the same under consideration, report as follows:

Your committee recommend the passage of this bill, the object of which is to ratify and confirm two certain agreements heretofore made with the Coeur d'Alene Indians in Idaho Territory, to make the necessary appropriations for carrying the same into effect, and for other purposes therein named.

These two treaties and a bill similar to this bill, to wit, Senate bill No. 2828, Fifty-first Congress, first session, have been duly submitted to and had the full consideration and favorable action of the honorable Secretary of the Interior, Commissioner of Indian Affairs, and the Commissioner of the General Land Office, as will be seen set forth in Exhibits A, B, C, D, hereto attached and made parts hereof.

On August 14, 1848, and for generations long prior thereto, the tribe of Coeur d'Alene Indians were in possession of and claimed to own the lands described in this bill and in said two treaties. On August 14, 1848, in the act " to establish the Territorial government of Oregon" (9 U.S. Stat., 323, sec. 1), Congress, when organizing the government for the Territory of Oregon, declared:

That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall be unextinguished by treaty between the United States and such Indians, or to affect the authority of the Government of the United States to make any regulation respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to the Government to make if this act had never passed.

On August 14, 1848, all the lands described in this bill and in these two treaties were wholly situate within the geographical limits of the Territory of Oregon.

On March 2, 1853 (10 U.S. Stat., 172) Congress passed an act "to establish the Territorial government of Washington," wherein it was provided:

That nothing in this act contained shall be construed to affect the authority of the Government of the United States to make any regulations respecting the Indians of said Territory, their lands, property, or other rights, by treaty, law, or otherwise, which would have been competent to the Government to make if this act had never been passed.

By virtue of this act all of said lands fell wholly within the Territory of Washington and so continued until March 3, 1863, when Congress organized the present Territory of Idaho (12 U.S. Stat., 808), by virtue of which last act the lands referred to and described in the first of these two treaties fell partly in Washington Territory and partly in Idaho Territory, while the lands described in the second of these two treaties fell exclusively in the Territory of Idaho.

In the second section of the act "to establish the Territorial government of Washington" (10 U.S. Stat., 173) the governor of said Territory was authorized to perform the duties of superintendent of Indian affairs.

In Section 1 of the act to provide for the temporary government of Idaho, Congress provided:

That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with any Indian tribes, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any State or Territory.

On March 3, 1853 (10 U.S. Stat., 238), Congress passed an act authorizing the President of the United States to enter into negotiations with the Indian tribes west of the States of Missouri and Iowa, for the purpose of securing the assent of said tribes to settlement by the citizens of the United States upon the lands claimed by said Indians and for the purpose of extinguishing the title of said Indian tribes to said lands, and appropriated the sum of $50,000 for the due execution of said act.

In the execution of this act of Congress, instructions were duly issued to the superintendent of Indian affairs of Oregon, Joel Palmer; to the superintendent of Indian affairs of Washington, Isaac I. Stevens; and to the superintendent of Indian affairs of Nebraska, Alfred Cumming, (the west boundary of Nebraska at that time being the summit of the Rocky Mountains and the north boundary of which was the forty-ninth parallel), to make treaties with all the Indians of said three Territories.

In the execution of these instructions treaties were duly made as set forth in a table attached hereto and marked Exhibit E.

From the recitals in Exhibit E it will appear that treaties were made between the United States and all the Indians claiming lands situate in Washington Territory, with the exception of the Coeur d'Alenes, Spokanes, Lawer [sic] Kootenais, Lower Pend d'Oreilles, and the Indians situate in the middle basin of the Upper Columbia in the vicinity of Colville and Okanagan, which Indian tribes claimed lands between the summit of the Cascade Mountains on the west, the forty-ninth parallel on the north, the summit of the Bitter Root or Coeur

d'Alene Mountains on the east, and the country of the Paloose on the south.

The reasons why treaties were not made with these particular tribes of Indians so named at that time are very fully set forth in a letter and report, copy of which is attached hereto and marked Exhibit F.

No treaty having been made with these Coeur d'Alene Indians by the superintendent of Indian affairs of Washington Territory as was made with the other Indians of said Territory under the aforesaid authorization of Congress, in the spring of 1858 Col. Steptoe, U.S. Army, with a large mounted military force, entered the country of these Coeur d'Alene Indians and that of the Spokanes, for the purpose, chiefly, of making a military reconnaissance; but certain of the Coeur d'Alenes and of the Spokane Indians, misconstruing the purposes of the Government of the United States by this military movement and laboring under the impression that their country was to be forcibly taken possession of by the troops of the United States, made an attack on said troops, defeated them, and drove them from their country. For the purpose of chastising said Indians for their said acts, the Government sent another and larger military force into their country under General George Wright in the summer of 1858, who whipped, thoroughly subdued said Coeur d'Alene and Spokane Indians and made a treaty only of peace with them at the old Coeur d'Alene Mission in Idaho in 1858.

At this treaty the grievances of these two tribes of Indians were recited by them, and they were left under the impression that the Government of the United States

would thereafter act justly and fairly toward them, so far at least as their lands were concerned. Nothing, however, was done in this direction prior to October 30, 1885, on which date Seltice, then and now the chief of the Coeur d'Alene Indians, addressed a letter to Hon. W. S. Holman, then chairman of the select committee of the House of Representatives authorized to visit the Indians and Indian reservations west of the Rocky Mountains, accompanied with a copy of a petition which on March 23, 1885, had been addressed by said Coeur d'Alene Indians to the President of the United States, Secretary of the Interior, and Commissioner of Indian Affairs, a copy of which correspondence and petition is printed in the appendix, attached hereto and marked Exhibit G[1], G[2], G[3], G[4], G[5], G[6]. To this letter and petition Hon. W. S. Holman made reply that said subject-matter of said letter, etc., of Seltice was not within the jurisdiction of his said committee, and thereupon he referred the whole subject-matter on March 31, 1886, to the honorable Secretary of the Interior, Mr. Lamar. (See Exhibit H.)

Nothing having been successfully done after this last effort to treat with said Indians, thereafter, to wit, on January 10, 1886, Rev. Joseph M. Cataldo, S. J. superior of the missions of the Rocky Mountains, addressed a letter to Capt. John Mullan, of Washington, D.C. (a friend then and now of the Coeur d'Alene and Spokane Indians, who had been favorably identified with them from 1854 to 1886, who knew their country and its value, who had thoroughly explored it in order to locate the line of the Northern Pacific Railroad route, who built through their said lands a United States military road while an officer of the United States Army, and who was aid to General

Wright in his said military operations in the field against these Indians in 1858, and who was present at the making of the said treaty of peace in 1858 between General Wright and said Indians, in behalf of the Spokane Indians, a copy of which letter is printed in the appendix herewith, marked Exhibit J. This letter was replied to on February 5, 1886, by Capt. John Mullan, in a report copy of which is printed in the appendix and marked Exhibit F, wherein referring to the Coeur d'Alene Indians he recited some of the wrongs done them, and in suggesting a remedy therefor he recommended that Congress make an appropriation of not less than $10,000 to defray the expenses of a commission which he recommended should be appointed to treat with (among others) these Indians for the cession of the lands described in the first of said two treaties.

This report and recommendation was duly submitted to the Interior Department, and transmitted to the Senate in response to are [sic] solution of that body, for its consideration and action, and which resulted finally in the insertion in the act of Congress approved June 30, 1887 (24 U.S. Stat., 44), an act entitled "An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June 30, 1887, and for other purposes," of an item authorizing a treaty to be made with said Coeur d'Alene Indians and others as in said act recited.

Under the provisions of this act of Congress, commissioners were duly appointed by the United States who negotiated the first of these two treaties, by virtue of which the Indian title will be extinguished to about

2,750,000 acres of land, more or less, should this bill become a law.

This treaty so negotiated was presented to the Fiftieth Congress, but not ratified for sundry reasons, among which was a desire on the part of the United States to acquire an additional area, to wit, a certain valuable portion of the reservation specially dedicated to the exclusive use of said Indians under an Executive order of 1873, and which portion of said lands, situate on the northern end of said reservation, is valuable and necessary to the citizens of the United States for sundry reasons. It contains numerous, extensive, and valuable mineral ledges. It contains large bodies of valuable timber accessible to and necessary to develop the extensive and rich Coeur d'Alene mines, situated within the limits of the land described in the first treaty, title to which the Indians have agreed to cede to the United States under the first of said treaties now asked to be ratified. It contains a magnificent sheet of water, the Coeur d'Alene Lake. and its chief tributary, to wit, the Coeur d'Alene River, over the waters of which steamers now ply daily from the city of Coeur d'Alene to the old Coeur d'Alene Mission, there connecting with a railway system penetrating into the very heart of said Coeur d'Alene mineral belt. It also controls the outlet of said lake, to wit, the Spokane River. It also includes the region of country along which the Northern Pacific Railroad Company has projected its branch line, from Rathdrum in Idaho via Fort Coeur d'Alene, destined, no doubt, to make a connection ultimately with its main trunk at Missoula, in Montana. It also includes the rich and extensive valley of the Coeur d'Alene River, containing rich hay meadows

which the said Indians as yet have never utilized, but which are of great value to said Coeur d'Alene mining belt.

The total area acquired by the United States under these two treaties, proposed and agreed to be ceded by the Coeur d'Alene Indians, aggregates about 3,000,000 acres more or less, secured at a total cost of $650,000, making an average cost of about 22 cents, more or less, per acre.

The first of these two treaties is sought to be ratified and confirmed in section 1 of this bill. The second of these two treaties is sought to be ratified and confirmed in section 2 of this bill. Sections 3 and 4 of this bill simply set forth the detailed provisions for the purpose of executing said two treaties in strict conformity with the terms of and in strict conformity with the request of said Indians as recited in said treaties. The lands agreed to be ceded by these Indians, while of great value to said Indians, yet are of greater, if not inestimable, value to the citizens of the United States in the eastern portion of the State of Washington and northern portion of the Territory of Idaho. The equivalent to be received from the United States by these Indians for these cessions of land will enable them to put up saw and grist mills, which now they have not; to improve their farms, which are now being cultivated in an entirely different portion of their present Reservation, to wit, the central and southern portion thereof. The lands so agreed to be ceded do not include a single cultivated farm of said Indians, so far as is now known.

The Coeur d'Alene Indians are advanced in civilization, agriculture, stock raising, and varied husbandry further, probably, than any Indians west of the Rocky Mountains, unless it be the Flatheads. Their farms are inclosed with six, seven, and eight Virginia rail fences; their houses are made of logs or lumber; hogs, cows, horses, and poultry of all kinds are to be seen around almost every farm house; reapers, headers, plows, farming and garden implements, heavy and spring wagons, buggies and American harness, in their possession, all bespeak the progress that these Indians have made in advancing civilization. They are all fully competent to guard, care for, save, or judiciously invest in the improvements of their farms, and otherwise, whatsoever sums of money may be paid to them by the United States under these two treaties. They possess a high order of intelligence, and know when and how to make proper treaties, agreements, or contracts wherever their own interests are involved, whether the same are to be made with the United States or with private individuals.

Section 5 of this bill, prior to restoring to the mass of the public domain the land so sought to be ceded by these two treaties, provides that a certain agreement made on June 1, 1871, between said Coeur d'Alene Indians and Frederick Post be ratified and confirmed; but makes it obligatory upon the Commissioner of the General Land Office and the Secretary of the Interior to finally pass upon the validity of the survey and final proof of the lands described in said agreement, and to pay therefor the cost of such survey and in addition thereto to pay the sum of $2.50 per acre for the acreage

described in said agreement between said Indians and said Post.

In the first of the blank spaces in section 3, page 16, line 24, should be inserted the word "first", and in the second of said blank spaces, in said line 24, should be inserted the word "September." In the blank space in line 25, section 3, page 16, should be inserted the word "ninety." In line 35, section 3, page 16, after the word "five," should be inserted "hundred."

In the blank space in line 3, section 4, page 17, should be inserted the words "six thousand," and in line 7, section 4, page 17, should be inserted the words "fourteen thousand."

With these suggestions, which are simply to perfect the bill in order to meet the requirements of said two treaties, your committee therefore favorably recommend the passage of this bill.

EXHIBIT A.

House Ex. Doc. No. 63, Fiftieth Congress, first session.

Message from the President of the United States, transmitting a communication from the Secretary of the Interior, with accompanying papers, relating to the reduction of Indian reservations.

To the Senate and House of Representatives:

I transmit herewith a communication of 30th December, 1887, from the Secretary of the Interior, submitting, with accompanying papers, two additional reports from the Commission appointed to conduct negotiations with

certain tribes and bands of Indians for reduction of reservations, etc., under the provisions of the act of May 15, 1886 (24 Stats., 44), providing therefor.

GROVER CLEVELAND.

EXECUTIVE MANSION,
January 9, 1888.

DEPARTMENT OF THE INTERIOR,
Washington, December 30, 1887.

THE PRESIDENT:

Under the respective dates of January 11 and February 17, 1887, I had the honor to submit to you for transmittal to Congress two separate reports received by this Department through the Commissioner of Indian Affairs from the Commission commonly known as the Northwest Indian Commission, appointed under the provisions of the act of May 15, 1886, to negotiate with certain Indian tribes in Minnesota and the Northwest Territories (24 Stats., 44).

Those two reports, with their accompanying correspondence, which may be found in Senate Ex. Docs. No. 30 and No. 115, Forty-ninth Congress, second session, relate, the first to an agreement made with the Arickaree, Gros Ventre, and Mandan Indians residing upon the Fort Berthold Reservation in Dakota, and the other to two agreements made with certain of the Chippewa Indians in the State of Minnesota.

I now have the honor to submit herewith two additional reports made by the said commission, with the accompanying letter of the Commissioner of Indian

Affairs forwarding them to the Department, with five agreements made with various tribes and bands of Indians in the Northwest, viz: The Gros Ventre, Piegan, Blood, Blackfeet, and River Crow Indians upon the reservation commonly known as the Great Blackfeet Reservation in northern Montana; the Upper and Middle bands of Spokane Indians; the Coeur d'Alene Indians; the Pend d'Oreille or Calispel Indians; the Indians upon the Jocko Reservation in Montana.

The Commission report that they visited the Bois Forte and Grand Portage Reservations in Minnesota and held council with the bands thereon, but failed to secure their acceptance of or consent to the agreements made with the other Chippewas on September 7, 1886.

The five agreements now presented, together with the three heretofore reported, complete the work of negotiation so far as it could be accomplished by the Department with the tribes and bands of Indians for which provision was made in the act of May 15, 1886.

The Commissioner of Indian Affairs in his report, herewith, reviews at some length the provisions of each of the accompanying agreements, which may be briefly though very generally summarized, as follows:

The agreement with the Indians in northern Montana provides for the cession to the United States of over 17,500,000 acres of the large reservation now occupied by them, estimated to contain 21,651,000 acres, for a consideration of $4,500,000, to be expended for the benefit of the Indians in manner therein provided, in ten annual installments, so far as may be required; any excess above such requirements to be placed in the Treasury to their credit,

etc. The unceded portion of the reservation to be divided into three separate reservations, whose boundaries are given, for the Indians belonging to the three agencies located therein.

The Upper and Middle bands of Spokane Indians, in the agreement with them, relinquish to the United States any right, title, and claim which they now have or ever had to any and all lands lying outside of the Indian reservations in Idaho and Washington Territories, and agree to remove to the Coeur d'Alene Reservation in Idaho, except such as prefer to go to the Jocko Reservation, in Montana, the consideration being $95,000, to be expended for their benefit in manner as specified in the agreement.

The Coeur d'Alene Indians, in the agreement made with them, relinquish to the United States, for the consideration of $150,000, to be expended for their benefit, etc., all right, title, and interest they now have or ever possessed to and in any lands outside the limits of their present reservation in the Territory of Idaho; they also agree to the removal to and settlement upon their reservation of the Upper and Middle bands of Spokane Indians, the Calispels (Pend d'Oreilles) now residing in the Calispel Valley, and to any other bands of non-reservation Indians belonging to the Colville Agency, Washington Territory, etc.

The Pend d'Oreille or Calispel Indians, in agreement made with them, relinquish all right, title, and claim they have or ever had to lands in Idaho or Washington Territories or elsewhere, and agree to remove to and settle upon the Jocko (Flathead) Reservation, in Montana, except such

as may prefer to go to the Colville Reservation, in Washington Territory, or to the Coeur d'Alene Reservation, in Idaho Territory; the consideration being the erection of saw and grist mill, building houses for Indians, clearing and breaking lands, etc.

The Indians on the Jocko (Flathead) Reservation, in the agreement with them, consent to the removal to and settlement upon their reservation of the Upper and Middle Spokanes and Pend d'Oreilles; the consideration being the erection on the reservation for the Indians, by the United States, of a saw and grist mill, and providing a blacksmith and tools, etc.

The law under which these negotiations have been conducted provides that "no agreement shall take effect until ratified by Congress."

The Commissioner of Indian Affairs in his report herewith expresses the opinion that these agreements are just and favorable alike to the Government and to the Indians. He recommends their speedy ratification, and submits estimates of the various amounts required to be appropriated at this time by Congress to carry out the terms of the negotiations, which will be found on the concluding pages of his report.

By these negotiations a very large area of land now in state of reservation for Indian purposes, being the excess of quantity needed for the actual use of the tribes and bands for whom it has been held in reservation, is placed at the disposal of the United States so that it may be opened to settlement in such manner as Congress in its wisdom may direct; and further, the adjustment of claims

asserted by Indians to large portions of land in Washington and Idaho Territories, now largely occupied by settlers, is provided for. When these negotiations shall have been fully ratified they will remove some serious hindrances to the contentment, the permanent settlement, and the more rapid advancement in civilization of the tribes and bands who are parties thereto. The money necessary to be appropriated for their support and to assist them forward in the ways of civilization will not be, as heretofore, so largely a gratuity from the Government, but will go to them by judicious expenditures as consideration for valuable rights and claims which they have ceded and relinquished to the Government.

For these and other like reasons I concur in the recommendation of the Commissioner that the agreements be speedily ratified.

I have the honor to be, very respectfully, your obedient servant,

L. Q. C. Lamar,
Secretary.

Department of the Interior,
Office of Indian Affairs,
Washington, December 13, 1887.

SIR: Referring to office reports, dated January 8 and February 11, 1887, respectively, transmitting two separate reports of the Northwest Indian Commission and accompanying agreements made with the Arickaree, Gros Ventre, and Mandan tribes of Indians occupying the Fort Berthold Reservation, in Dakota, and the Chippewa Indians in Minnesota, which reports, agreements, and

accompanying papers form the subject-matter of Senate Ex. Docs. No. 30 and 115, respectively, Forty-ninth Congress, second session, I now have the honor to transmit herewith duplicate copies of two additional reports of said Commission and accompanying agreements (five in all) made with the several tribes in northern Montana, occupying the Gros Ventre, Piegan, Blood, Blackfeet, and Crow River Reservation, commonly known as the Great Blackfeet Reservation, and the Upper and Middle bands of Spokane Indians, the Pend d'Oreilles, or Calispels, and the Coeur D'Alenes in Idaho, and the Flathead, Pend d'Oreille and Kootenai Indians of the Flathead Reservation in Montana. These reports are dated, respectively, February 11 and June 29, 1887.

The authority under which these several agreements were negotiated is found in the Indian appropriation act, approved May 15, 1886 (24 Stats., p. 44), which reads as follows:

To enable the Secretary of the Interior to negotiate with the several tribes and bands of Chippewa Indians in the State of Minnesota for such modification of existing treaties with said Indians and such change of their reservations as may be deemed desirable by said Indians and the Secretary of the Interior, and as to what sum shall be a just and equitable liquidation of all claims which any of said tribes now have upon the Government; and also to enable said Secretary to negotiate with the various bands or tribes of Indians in northern Montana and at Fort Berthold, in Dakota, for a reduction of their respective reservations, or for removal therefrom to other reservations; and also to enable said Secretary to negotiate with the Upper and Middle bands of Spokane Indians and Pend d'Oreille Indians, in Washington and Idaho Territories, for their removal to the Colville, Jocko, or Coeur

d'Alene Reservations, with the consent of the Indians on said reservations; and also to enable said Secretary to negotiate with the Coeur d'Alene Indians for the cession of their lands outside the limits of the present Coeur d'Alene Reservation to the United States, $15,000, or so much thereof as may be necessary, to be immediately available; but no agreement shall take effect till ratified by Congress.

THE AGREEMENT WITH THE INDIANS IN NORTHERN MONTANA.

Briefly stated, the agreement concluded with the various bands or tribes occupying the Great Blackfeet Reservation, in northern Montana, provides for the cession to the United States of by far the greater part of that vast reservation lying along the international boundary and extending east to the Dakota line and west to the summit of the Rocky Mountains, with the Missouri and Marias Rivers and Birch Creek for its southern boundary, estimated to contain 33,830 square miles, or 21,651,000 acres – an area three times as large as that of Maryland, larger than the State of Indiana, almost as great as that of South Carolina, and greater than the New England States, leaving out the State of Maine.

According to the report of the Commission, the territory ceded to the United States under the agreement embraces an area of about 17,500,000 acres – more than three-fifths of the entire reservation.

The remaining unceded lands are divided into three separate reservations – one for the Indians now attached to the Fort Peck Agency, one for the Indians attached to

the Fort Belknap Agency, and the third for the Indians attached to the Blackfeet Agency.

It might be proper to state here that the Great Blackfeet Reservation is at present claimed and held in common by the Indians of the three above-named agencies, no division of the territory ever having been made by competent authority; hence the negotiations were conducted alike with all, and but one agreement was executed with the several bands.

The three separate tracts reserved by the Indians for their future homes are situated as follows: The Fort Peck Reservation, on the Missouri River, north side, from Porcupine Creek to the Big Muddy, and extending north 40 miles. The Fort Belknap, on Milk River, south side, from the mouth of Snake Creek to the mouth of People's Creek, and extending south to the summit of the Little Rockies. The Blackfeet, in the extreme western part of the present reservation, extending from the Cut Bank to the summit of the Rocky Mountains, and from Birch Creek to the British Possessions.

The descriptions given are only general; for a more particular definition of the respective boundaries reference should be had to the agreement.

The tribes or bands for whom the several separate reservations are made retain no interest whatsoever in any reservation other than the one set apart for their separate use and occupation respectively.

The compensation agreed upon for the cession of their surplus lands is as follows:

For the Indians of the Fort Peck Agency, $165,000 annually for ten years; for the Indians of Fort Belknap Agency, $115,000 annually for ten years, and for the Indians of the Blackfeet Agency, $150,000 annually for the same period, the money to be expended for the purchase of cows, bulls, and other stock, goods, clothing, subsistence, agricultural and mechanical implements; in providing employees; in the education of Indian children; in procuring medicine and medical attendance; in the care and support of the aged, sick and infirm, and helpless orphans of said Indians; in the erection of such new agency and school buildings, mills, blacksmith, carpenter, and wagon shops as may be necessary; in assisting the Indians to build houses and inclose their farms, and in any other respect to promote their civilization, comfort, and improvement.

It is also agreed that in the employment of farmers, artisans, and laborers preference shall in all cases be given to Indians residing on the reservation who are found to be well qualified for such employment.

The sale, exchange, or slaughtering of cattle issued to the Indians for breeding purposes, or their increase, except by consent of the agent in charge, is prohibited, but the Commissioner of Indian Affairs may remove such restriction.

It is further agreed that whenever, in the opinion of the President, the yearly installments of $165,000, $115,000, and $150,000 shall be more than is required to be expended in any one year in carrying out the stipulations of the agreement, so much thereof as may be in excess of the requirement shall be placed in the Treasury

to the credit of the Indians, and expended in continuing the benefits of the agreement after the ten years during which the installments are to run shall have expired.

In the distribution of cattle and other stock, goods, clothing, subsistence, and agricultural implements preference is to be given to Indians who endeavor by honest labor to support themselves, and especially to those who in good faith undertake the cultivation of the soil, or the raising of stock as a means of livelihood. Suitable provision is made for the protection of Indians whose homes fall within the ceded territory and for the survey and marking of the outboundaries of the diminished reservations, the cost of such survey to be paid for out of the first installments appropriated.

Right of way is secured for railroads, wagon-roads, and telegraph lines whenever, in the opinion of the President, the public interests require their construction through either of the three separate reservations.

It is the deliberate judgment of the Commissioners that these Indians are not as yet prepared to take lands in severalty, and they are equally positive that even if they were so prepared the country occupied by them is wholly unsuited for that experiment.

As the subject is one of special interest, in view of the policy of the Government to allot lands in severalty to Indians whenever and wherever practicable, I quote the following from their report:

Neither of these bands are as yet prepared to take lands in severalty. Indeed, the country occupied by them is not suitable for that experiment. It is in no sense a good agricultural country, and it would be a very difficult

matter, if not impossible, for a white man to make a living there if confined strictly to the cultivation of the soil.

Montana, aside from its mineral resources, is essentially a stock-raising country, the northern portion of it especially being but poorly adapted to anything else; hence it is that stock-raising has become the principal industry of the people. The frequent failure of crops, owing to the aridity of the soil, renders farming not only unprofitable but uncertain as a means of support; therefore, if the Indians in northern Montana are ever to become self-supporting they must follow the pursuits which the whites by long experience have found the country best adapted to – cattle, sheep, and horse raising. This need not, and should not, be to the entire exclusion of farming, but it should become their chief industry and dependence.

It can be said positively that the Fort Peck Indians can never become self-supporting where they now are through the cultivation of the soil alone; but there can be no doubt that with proper encouragement they would soon reach that position as stock-growers. Stock-herding is suited to their tastes; they are willing to work, and realize the necessity of doing for themselves; and it is but right and just that their efforts should be encouraged and directed in a way that will be most likely to advance their civilization and happiness. Furthermore, it is absolutely certain that unless they have cattle given them and become stock-raisers the Government will be obliged to support them for all time, or allow them to starve.

Holding to these views, we have made provision in the agreement with them to enable them to become self-supporting as a pastoral people. The reservation set apart for them is ample, but not too large, and was selected with that end in view. The consideration agreed upon for the cession of their surplus lands will be sufficient to provide them with cattle, sheep, and other stock for a

successful start in that direction, and to subsist and otherwise care for them, until they are able to support themselves without aid from the Government. * * *

The promise of stock cattle was the principal inducement which led to the cession of the vast territory relinquished to the Government. * * *

What has been said in regard to the policy to be pursued with the Fort Peck Indians is equally true in respect of the Fort Belknap and Blackfeet Agency Indians. They must be encouraged in stock-raising as well as in agricultural pursuits. They never can become self-supporting in any other way.

There are not less than 2,300 Sioux and about 1,100 Assinaboines at the Fort Peck Agency, for whom the reservation on the Missouri between Porcupine Creek and the Muddy was set apart. The question of the advisability and practicability of removing the Sioux to the Great Sioux Reservation in Dakota was thoroughly considered by the Commissioners, and the decision reached that it was not advisable to make any attempt in that direction. The Indians themselves were firmly opposed to such change of residence and manifested a good deal of surprise and uneasiness at the mere suggestion of it by the Commissioners. They claim equal rights with the other Indians in the Great Blackfeet Reservation, which claim was not disputed by either of the other bands. The Government placed them there nearly a quarter of a century ago, and by long residence they have become greatly attached to the country and could not be easily persuaded to abandon it.

The Sioux are settled in the immediate vicinity of the agency, and the Assinaboines mainly at Wolf Point, about 20 miles west, on Wolf Creek.

The reservation for these two bands was selected with special regard to convenience, utility, and capacity for stock-raising, for, as has already been said, the promise of stock cattle was the principal inducement with all the tribes or bands which led to the cession of the vast territory ceded by them to the Government.

The Commissioners report that the agreement with the Fort Peck Indians was satisfactory alike to the Indians and their friends present during the progress of the negotiations, and they express the belief that if strictly carried out the Indians will require no further aid from the Government.

The Fort Belknap Agency Indians were unwilling to remove either to Fort Peck or any other distant point, but consented unanimously to remove from their present locality near Fort Assinaboine to the reservation selected for them east of Snake Creek and between Milk River and the Little Rockies. The Commissioners describe the new selection as affording the best lands for agricultural purposes in all that region of country. It is well watered, they say, and susceptible of irrigation at a small cost. Besides, it is admirably adapted to stock-raising. Timber is plenty for needed agency buildings and Indian houses.

They refer to the proximity of the present habitations of the Indians to the military post of Fort Assinaboine, and the baneful influence of such close contact upon the health and morals both of the garrison and Indians. This evil, in the opinion of the Commissioners, can only be

remedied by removing the Indians further from the post, as in the agreement provided. There are about 1,700 Indians at Fort Belknap Agency – Assinaboines and Gros Ventres, the latter only slightly outnumbering the former.

The Indians of the Blackfeet Agency, the last visited, appear to have been more exacting in their demands than any of the other Indians. The Commissioners observe that it was very evident from the beginning of the negotiations that they had been tampered with by designing white men whom they found at the agency, and who hoped to gain some advantage to themselves in one way or another. Their chiefs complained of ill-usage and bad faith on the part of the Government in times past, and the negotiations were considerably delayed by their unreasonable and persistent demands.

Finally, however, they consented to the agreement as already executed by the Indians of the other two agencies, and selected the reservation heretofore described.

In explanation of the apparent disproportion in the sums agreed upon as compensation for the ceded territory, between the Indians of this and the other two agencies, the Commissioners state that the needs of the Blackfeet Indians are proportionally greater than the others, and that there are from 500 to 1,000 Indians on the other side of the international line who may properly be regarded as belonging to the Blackfeet Agency, and are likely sooner or later to return to the agency; and, furthermore, they believe that they (the Blackfeet Agency Indians) have the most ancient claim to the ceded territory, having occupied it as far back as their history is known.

In closing their report upon the agreement with the Indians of the Great Blackfeet Reservation, the Commissioners observe as follows:

What has been said in regard to the policy to be pursued with the Fort Peck Indians is equally true in respect of the Fort Belknap and Blackfeet Agency Indians.

They must be encouraged in stock-raising as well as in agricultural pursuits. They can never become self-supporting in any other way. * * *

The execution of the agreement with the Piegans, Bloods, and Blackfeet concludes our labors with the Indians in northern Montana. * * *

We have made every possible effort looking to the conclusion of this work in time to get it before Congress, if it should so please the Department, during the present session, and we trust that it is not yet too late. No human foresight could have accomplished more. We have traveled night and day in open vehicles during a period of cold weather which will be memorable in the history of Montana, and without a day's delay that could possibly have been avoided.

AGREEMENT WITH THE UPPER AND MIDDLE BANDS OF SPOKANE INDIANS.

Early in March, 1887, negotiations were opened with these Indians for their removal to the Colville, Jocko, or Coeur d'Alene Reservations, as contemplated in the act aforesaid. They are scattered over the country in the neighborhood of Spokane Falls. The Commissioners found them poor, and for the most part residing upon almost barren lands. They are addicted to strong drink and gambling, and the majority of them spend their lives

hanging about Spokane Falls, either begging or performing menial services for the whites. In all their travels the Commissioners found no Indians so utterly degraded and helpless.

The Commissioners were strongly impressed with the wrongs these people have suffered in times past by having their lands gradually wrested from them without compensation in any form.

When the treaties of 1855 were made with the various tribes east of the Cascade Mountains, these Indians were passed by, although they had just as good a claim to recognition as any of the tribes treated with. They laid claim to a large area of country then occupied by them, which has gradually been settled upon by the whites until it has all passed from their hands. The object of the recent negotiations was to obtain a relinquishment from them of all claim against the Government on account of lands thus taken from them, to pay them a fair consideration for such relinquishment, and to effect their removal and settlement upon one of the existing neighboring reservations, with the consent of the Indians already occupying such reservation.

As the result of the negotiations, said Indians – the Upper and Middle bands of Spokanes – agreed to relinquish to the United States any right, title, or claim they now have, or ever had, to lands in Idaho and Washington Territories, and to remove to the Coeur d'Alene Reservation in Idaho. A few expressed a preference for the Jocko Reservation in Montana, and it was accordingly agreed that any who so desired should be permitted to settle on

said reservation, and have their pro rata share of the benefits provided in the agreement.

At first they strongly insisted upon having a reservation established for them on the Little Spokane River, but when shown that their request could not be complied with under the terms of the act providing for the negotiations, they concluded to accept the proposition to remove to the Coeur d'Alene and Jocko Reservations.

The consideration agreed upon for the cession of the lands claimed by them was $95,000, to be expended in the erection of houses, in assisting them in breaking land, in the purchase of cattle, seeds, agricultural implements, saw and grist mills, clothing, subsistence, in taking care of the aged, sick, and infirm, in providing educational facilities, and otherwise to promote their civilization and well-being – $30,000 the first year, $20,000 the second, and $5,000 per annum for eight years thereafter. The balance of $5,000 is to be expended in encouraging farm labor, as stipulated. It is also agreed that the United States shall pay to each of the six chiefs of the tribe $100 per annum for the period of ten years.

The Indians are to be permitted to select their homes on the Coeur d'Alene Reservation from a tract of land to be laid off and surveyed for the purpose, without, however, interfering with the lands now occupied by the Coeur d'Alene Indians, and they agree to take allotments as provided in the recent act of Congress known as the general allotment act.

By a further provision it is agreed that any Indian who has settled and made improvements upon the public domain, with the intention of acquiring title to the same

under the laws of the United States relating to public lands, may continue to occupy the same, and acquire title thereto.

There are other minor provisions calculated to benefit and improve the condition of the Indians.

The Commissioners report that many of the Indians are anxious to remove at once to their new homes, and they strongly urge the speedy ratification of the agreement.

AGREEMENT WITH THE COEUR D'ALENE INDIANS.

These Indians also lay claim to a large tract of country in Washington, Idaho, and Montana Territories, by right of original occupancy, and, as we have seen, the act authorized negotiations with them "for the cession of their lands outside the limits of the present Coeur d'Alene Reservation to the United States."

By the terms of the agreement made with them, the Indians cede and relinquish to the United States all right, title, and interest they now have or ever possessed in any lands outside the limits of their present reservation.

They also agree to the removal and settlement upon their reservation of the Upper and Middle bands of Spokane Indians, upon the terms and conditions agreed upon with said Spokane Indians, and also to the removal and settlement there of the Calispels (Pend d'Oreilles) now residing in the Calispel Valley, and any other band of non-reservation Indians belonging to the Colville Agency, upon terms agreed upon with any such bands.

In consideration of the foregoing, it was agreed that the Coeur d'Alene Reservation shall be forever held as Indian lands, for the home of the Coeur d'Alene and other bands settled there under said agreements, and that it shall never be sold or otherwise disposed of without their consent.

It is further agreed that the United States shall expend the sum of $150,000 for the benefit of the Coeur d'Alene Indians: $30,000 the first year and $8,000 per annum for fifteen years thereafter, in providing them with a steam saw and grist mill, in the employment of an engineer and miller, and in the purchase of such useful articles as shall best promote their civilization, education, and comfort, and, under certain stipulated conditions, cash payments may be made to them. In addition to this, it is agreed that the United States shall employ, at its own expense, a competent physician, blacksmith, and carpenter, and supply medicines for said Coeur d'Alene Indians.

There are some other provisions intended to protect the morals and improve the condition of said Indians, but the foregoing are the principal features of the agreement.

The Commissioners give an interesting account of the Coeur d'Alene Indians, and commend them in the highest terms for industry, thrift, and sobriety. They speak of them as polite in a marked degree and exceedingly good-natured. They wear short hair, dress like the whites, and emulate them in everything save their vices. They live in comfortable houses, many of them having two – one on the farm and another in the village – cultivate the soil extensively, are loyal to the Government, respectful of the laws, devoted to their religion, and in short a better

ordered or behaved community of Indians can nowhere be found. Such is the testimony of the Commissioners.

AGREEMENT WITH THE PEND D'OREILLE OR CALISPEL INDIANS.

An agreement was entered into with these Indians at Sand Point, Idaho, whereby they agreed to remove to and settle on the Jocko (or Flathead) Reservation in Montana. They relinquish all claims they have or ever had to lands in Idaho and Washington Territories, or elsewhere. If any of them prefer to settle on the Colville Reservation, in Washington Territory, or the Coeur d'Alene, in Idaho, they are permitted to do so.

In consideration thereof the United States agrees to erect a saw and grist mill on the Jocko Reservation for their use; to build a sufficient number of houses for their accommodation; to assist them in clearing, breaking, and fencing not less than 5 acres of land for each family; to provide certain employés; to purchase agricultural and other needed implements, seeds, clothing, and medicines; to care for the sick, aged, and infirm, and to otherwise assist them as their wants may require.

Chief Victor is to have $100 per annum during the remainder of his life; and any of the Indians who have made improvements where they now reside, are to be permitted to dispose of the same by sale and receive payment therefor.

AGREEMENT WITH THE INDIANS OF THE JOCKO RESERVATION.

Negotiations were had with these Indians, in order to obtain their consent to the removal and settlement of such of the Upper and Middle Spokanes and Pend d'Oreilles as should elect to settle there under the agreements previously made with them. Such consent was obtained, and in consideration thereof the United States agrees to erect a saw and grist mill on said reservation for the tribes now in occupation thereof, and to provide a competent blacksmith for them and tools for his use.

THE BOIS FORTE AND GRAND PORTAGE BANDS OF CHIPPEWAS IN MINNESOTA.

Having concluded all authorized negotiations with the Indians in the Northwestern Territories, the Commission, in the early part of April, returned to Minnesota, in order to complete the work necessarily postponed in November on account of the closing of navigation on Lake Superior, and the consequent difficulty of reaching the Bois Forte and Grand Portage Reservations at that season of the year.

The agreement of August 11 and September 7, 1886, with the White Earth and Pillager and Lake Winnebagoshish bands of Chippewas was presented to the Bois Forte and Grand Portage bands, in council assembled, all its provisions carefully explained, and its benefits offered to them. Neither band was willing to remove from its present reservation, and as that was one of the principal conditions of the agreement, it was rejected unanimously by both bands.

The grounds of their opposition to the agreement are fully set forth in the report of the Commission.

With the visit to the Bois Forte and Grand Portage bands the duties of the Commission in the field terminated.

In submitting these several agreements (5) for transmittal to Congress, I have the honor to make the following suggestions and recommendations:

In my annual report for the current year, in speaking of the work of this Commission, I observed that it was not to be expected that any suggestions or recommendations of the Commission would be adopted by Congress which the existing severalty law might render unnecessary.

After carefully reviewing the reports of the Commission and the several agreements submitted by them, I am free to say that in my judgment the severalty act, so called, could not be substituted for the agreement made with the Indians in Northern Montana, nor the several agreements made with the Indians in Idaho and Washington Territories, with equal benefit to the Indians concerned, for the following reasons:

The Indians in northern Montana – on the Great Blackfeet Reservation – are not sufficiently advanced in civilization to take lands in severalty, and assume the obligations and responsibilities of citizenship which is conferred upon all those to whom individual allotments are made under said act.

Not only are they not prepared to take lands in severalty, but they do not desire to take that step at

present; and the President has wisely ordered that allotments shall be made only on reservations where the Indians are known to be generally favorable to the experiment. Moreover, as shown in the beginning of this report, the country occupied by them is altogether unsuitable for that purpose. The Indians must be provided with stock for breeding purposes, and encouraged to raise cattle, sheep, and horses, not to the entire exclusion of farming, but as their chief industry and dependence. This they can do better, probably, at least for some time to come, by holding their lands in common. There is nothing, however, to prevent their taking grazing lands in severalty if at any time in the future it shall be deemed desirable to try the experiment with them.

Furthermore, if the agreement should fail of ratification, it is likely that these Indians will for a long time to come remain, as now, entirely dependent upon the bounty of the Government; and their vast possessions will continue to stand as a bar to the progress and development of the Territory which embraces them.

The agreements with the Upper and Middle bands of Spokane Indians and the Pend d'Oreille Indians provide for their removal and settlement upon the Coeur d'Alene and Jocko Reservations, and for the settlement of claims against the Government on account of lands taken from them in times past without compensation. The severalty act could not accomplish these much-desired objects, nor could it be substituted for other beneficent provisions found in said agreements with the Coeur d'Alene and Flathead (Jocko Reservation) Indians. The former provides for the settlement of a land claim similar to those of

the Spokanes and Pend d'Oreilles; and also makes provision for the settlement of the Spokanes on the Coeur d'Alene Reservation, while the latter provides that the scattered Pend d'Oreille and other Indians may settle on the Jocko Reservation; objects greatly to be desired.

From all that has been said, then, it will be seen that the several agreements must stand upon their own merits, irrespective of the severalty act, whose provisions it will be my endeavor to carry out wherever practicable.

To my mind the agreements are just and favorable alike to the Government and Indians. Millions of acres of land, equal to a great State, are made available to the white settler; long-standing and provoking claims against the Government are amicably adjusted; a very large number of Indians hitherto living in idleness, poverty, and vice – a standing menace to the peace of the country – are to be gathered upon existing reservations, and assisted in the paths of civilization and toward their final self-support; and I think if faithfully carried out the future of these Indians will be extremely hopeful.

I therefore have the honor to recommend their speedy ratification.

Should Congress be pleased to take such favorable action thereon, the following sums of money should at the same time be appropriated to carry the agreements in effect, viz:

NORTHERN MONTANA INDIANS.

First installments, as per Article III of the agreement with the Indians of the Great Blackfeet Reservation	$430,000

NOTE.—Congress appropriated $235,000 for the support of these Indians, the current fiscal year, *as an absolute gratuity.*

UPPER AND MIDDLE BANDS OF SPOKANE INDIANS.

First installment, as per Article V of the agreement with said Indians		$30,000
Pay of blacksmith and carpenter, at $900 each, Article VI		1,800
Pay of six chiefs, at $100 each, Article IX		600
Total		32,400

COEUR D'ALENE INDIANS.

First installment, as provided in Article VI of agreement		30,000
Pay of physician	$1,200	
Purchase of medicines	150	
Pay of blacksmith	900	
Pay of carpenter	900	
		3,150
Total		33,150

PEND D'OREILLE OR CALISPELS.

Article 1: Saw and grist mill	$6,225
Dwelling houses (40)	6,000
Clearing, breaking, and fencing	1,500
Engineer, $720; miller, $720; carpenter, $900; blacksmith, $900	3,240

Cows, $3,200; horses, $10,000; wagons, $2,000; harnesses, $600; stoves and agricultural implements, $1,500; clothing, medicines, and seeds, $2,500; removal of Indians, $1,000; Article III, pay of chief, $100		20,900
Total		37,865

FLATHEADS AND OTHER INDIANS OF JOCKO RESERVATION.

Saw and grist mill.....		$6,225
Pay of miller.....	$720	
Pay of blacksmith	900	
		$1,620
Purchase of tools.....		500
Total.....		8,345

Very respectfully, your obedient servant,

J.D.C. ATKINS,
Commissioner.

The SECRETARY OF THE INTERIOR.

EXHIBIT B.

Fiftieth Congress, First Session, Senate Ex. Doc. No. 76.

Letter from the Secretary of the Interior, transmitting, in response to Senate resolution of January 25, 1888, information about the Coeur d'Alene Indian Reservation, in Idaho.

DEPARTMENT OF THE INTERIOR,
Washington, February 9, 1888.

SIR: I have the honor to acknowledge the receipt by the Department, on the 26th day of January last, of a

resolution of the Senate, adopted upon the 25th of January, 1888, which, omitting the preamble thereto, is in the following words:

Resolved, That the Secretary of the Interior be, and he is hereby, directed to inform the Senate as to the extent of the present area and boundaries of the Coeur d'Alene Indian Reservation in the Territory of Idaho; whether such area includes any portion, and if so about how much, of the navigable waters of Lake Coeur d'Alene and of Coeur d'Alene and St. Joseph Rivers; about what proportion of said reservation is agricultural, grazing, and mineral lands, respectively; also the number of Indians occupying such reservation; also on what portion of said reservation the Indians now thereon are located; also whether, in the opinion of the Secretary, it is advisable to throw any portion of such reservation open to occupation and settlement under the mineral laws of the United States, and, if so, precisely what portion; and also whether it is advisable to release any of the navigable waters aforesaid from the limits of such reservation.

In response thereto I transmit herewith a communication, under date of the 7th instant, from the Commissioner of Indian Affairs, to whom the resolution was referred to report the facts required to properly meet the inquiries therein contained. This report states that the Coeur d'Alene Reservation, in the Territory of Idaho, embraces an area of 598,500 acres – 935 square miles; that it is situated in the northern portion of the Territory, between the 47th and 48th parallels of north latitude, and presents as an exhibit a map showing the outline boundaries of the reservation. It describes the portions of the navigable waters of Lake Coeur d'Alene and of the Coeur d'Alene River which traverses the reservation, and states the absence of information necessary to show how much

of the St. Joseph River, which flows through the reservation, is navigable, or whether it is navigable at all.

The Commissioner also reports that as but a small portion of the reservation has been surveyed (less than three townships), he is unable to furnish more than a rough estimate of the character of the lands embraced therein, which is that at least one-third of its entire area is agricultural, one third mountain and timber, and the remainder hilly and probably suitable for pasturage; that east of the lake and north of the Coeur d'Alene River the lands are described as "all mountains," and along the north line of the reservation, also east of the lake, are lands described as mineral lands. He also reports the number of Indians upon the reservation, as per last census, to be 487, nearly all of whom, he believes, live on that portion of the reservation lying south of the Lake Coeur d'Alene and St. Joseph River, and not far away from the Old Mission on Hangman's Creek.

The Commissioner further states that, in his opinion, the reservation might be materially diminished without detriment to the Indians, and that changes could be made in the boundaries for the release of some or all of the navigable waters therefrom which would be of very great benefit to the public; but this should be done, if done at all, with the full and free consent of the Indians, and they should, of course, receive proper compensation for any lands so taken.

In connection with this matter the Commissioner refers to the negotiations lately authorized by Congress and concluded with these Indians for the cession of their lands outside the limits of the present Coeur d'Alene

Reservation, as shown by agreement published in House Ex. Doc. No. 63, Fiftieth Congress, first session, pp. 53-56, under the provisions of which arrangement has been made for the removal to and settlement upon said reservation of sundry non-reservation Indians; and he reports as his opinion that when the present agreement shall have been ratified it will be an easy matter to negotiate with the Coeur d'Alenes for the cession of such portions of their reservation as they do not need, including all or a portion of the navigable waters, upon fair and very reasonable terms.

I have the honor to be, very respectfully,

H. L. MULDROW,
Acting Secretary.

The PRESIDENT PRO TEMPORE OF THE SENATE.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, February 7, 1888.

SIR: I have the honor to acknowledge the receipt, by your reference the 26th ultimo for report, of a resolution of the Senate of the United States of January 25, 1888, as follows:

Whereas it is alleged that the present area of the Coeur d'Alene Indian Reservation, in the Territory of Idaho, embraces 480,000 acres of land; that there are, according to the statistics in the Indian Bureau, only about 476 Indians in the tribe now occupying such reservation, or more than 1,000 acres to each man, woman, and child; that Lake Coeur d'Alene, all the navigable waters of Coeur d'Alene River, and about 20 miles of the navigable part of St. Joseph River, and part of St. Mary's, a

navigable tributary of the St. Joseph, are embraced within this reservation, except a shoreline of about 3½ miles at the north end of the lake, it being alleged that this lake and its rivers tributary constitute the most important highways of commerce in the Territory of Idaho, and are in fact the only navigable waters except Snake River, now used for steam-boat navigation, in the Territory; that all boats now entering such waters are subject to the laws governing the Indian country, and all persons going on such lake or waters within the reservation lines are trespassers; and

Whereas it is further alleged that the Indians now on such reservations are located in the extreme southwest corner of the same, around De Smedt Mission, near the town of Farmington, in Washington Territory, where the land is good for agriculture; and it being further alleged that all that part of such reservation lying between Lake Coeur d'Alene and Coeur d'Alene River and that part between the Coeur d'Alene River and St. Joseph River is a territory rich in the precious metals and at the same time being of no real use or benefit to the Indians:

Therefore,

Resolved, That the Secretary of the Interior be, and he is hereby, directed to inform the Senate as to the extent of the present area and boundaries of the Coeur d'Alene Indian Reservation in the Territory of Idaho; whether such area includes any portion, and if so, about how much, of the navigable waters of Lake Coeur d'Alene, and of Coeur d'Alene and St. Joseph Rivers; about what proportion of said reservation is agricultural, grazing and mineral land, respectively; also, the number of Indians occupying said reservation; also, on what portion of such reservation the Indians now thereon are located; also whether, in the opinion of the Secretary, it is advisable to throw any portion of such reservation open to occupation and settlement under the mineral laws of the United

States, and, if so, precisely what portion; and also, whether it is advisable to release any of the navigable waters aforesaid from the limit of such reservation.

Agreeably with the directions contained in said resolution I have the honor to state:

(1) The Coeur d'Alene Reservation, in the Territory of Idaho, embraces an area of 598,500 acres, or 935 square miles.

It lies in the northern portion of said Territory, between the forty-seventh and forty-eighth parallels of north latitude, and has for its western boundary the dividing line between Idaho and Washington Territories.

It is somewhat in the shape of a scalene triangle with one of its points cut off, its longest side (east boundary line) being about 42 miles, and its shortest (north boundary line) about 35 miles long. The west line is about 39 miles long.

From the official map of Idaho (1883) and sundry others examined, the reservation appears to embrace all the navigable waters of Lake Coeur d'Alene, except a very small fragment cut off by the north boundary of the reservation, which runs "in a direct line" from the Coeur d'Alene Mission to the head of Spokane River.

This lake is about 35 miles long and from 2 to 5 miles wide.

The Coeur d'Alene River traverses the reservation for a distance of about 25 miles, entering the reservation from the east and emptying into Lake Coeur d'Alene.

The St. Joseph River also flows through the reservation, entering from the east and finding its outlet in said lake.

The Coeur d'Alene River is navigable in its entire course through the reservation, and steamers ply from the head of the lake to the mouth of the river, and thence up the river to the Old Mission on the east line of the reservation, a river passage of about 25 miles. How much farther the river is navigable toward its source and beyond the limits of the reservation I have no means of knowing.

I am unable to furnish any information as to how much of the St. Joseph River is navigable, or whether indeed it is navigable at all. From the maps it would appear to be quite as large as the Coeur d'Alene River.

As to what proportion of the reservation is agricultural, grazing, and mineral land, respectively, I have to state that, as but a very small portion (less than three townships) of the reservation has been surveyed I am unable to furnish anything more than a rough estimate of the areas of the several classes referred to. From a rude sketch of the reservation prepared by the farmer in charge, with a view to showing as nearly as possible the character of the lands embraced within the reservation, I should judge that at least one-third of the entire area of the reservation is agricultural, one-third mountain and timber, and the remainder hilly and probably suitable for pasturage.

I inclose a copy of the map or sketch, and invite especial attention to it as giving the most satisfactory

information obtainable from the records of this office. It is drawn upon a scale of 2 miles to the inch.

It will be observed that the lands in the extreme northern portion of the reserve, west of the lake, for a distance of 10 or 12 miles south, are described as "timbered lands on mountains, with small valleys of pasture lands." From thence south to the hills south of the Farmington Landing road they are set down either as the first or second class "agricultural lands," and so of all the lands lying directly south of the lake until the "hill-land" is reached. Then south of the hilly lands, extending along the entire course of Hangman's Creek, is a wide strip described as "agricultural lands, first class."

East of the lake and north of the Coeur d'Alene River the lands are described as "all mountains," and along the north line of the reservation, also east of the lake, are lands described as "mineral lands."

A strip one-half mile wide on both sides of the Coeur d'Alene River along its entire length is described as "fertile valley, overflowed every spring."

South of the Farmington road and along the entire east line of the reservation is a broad strip varying from 2 to 8 miles wide, described as "all hill-land; is timbered, and soil third rate, in places rocky."

The west side of Coeur d'Alene Lake appears to be skirted all along with timbered mountains or hills.

A map accompanying the report of an inspection made in 1886 by Lieut. Col. H. M. Lazelle, Twenty-third Infantry, acting inspector-general, Department of the Columbia, with reference to the sale of liquor upon the

steamer *Coeur d'Alene* within the navigable waters of the reservation, will be found valuable, as showing the location of the neighboring towns and mines with reference to the reservation, the steam-boat route through Lake Coeur d'Alene and the Coeur d'Alene River, the wagon road and trails entering and crossing the reservation, mountain ranges, railroads, etc., and I have thought best to have a copy of said map made to accompany this report.

It might be proper to state here that Inspector Gardner, who visited the Coeur d'Alene Reservation in September of last year, places a much smaller estimate upon the quantity of agricultural land within the reservation than the farmer's map would indicate, but he could hardly be expected to have as perfect a knowledge of the reservation as the resident farmer in charge.

Inspector Gardner says:

The land embraced in the Coeur d'Alene Reserve, 598,500 acres, is in Idaho Territory. It is rough and very mountainous, and not more than 50,000 or 60,000 acres susceptible of profitable cultivation. * * * A large portion of the reservation is heavily timbered.

The number of Indians occupying the reservation as per last census, taken June 30, 1887, is 487. I believe all, or nearly all, live on that portion of the reservation lying south of the Lake Coeur d'Alene and St. Joseph River, and not far from the Old Mission on Hangman's Creek.

The question which remains to be answered is, whether it is advisable to throw any portion of the said reservation open to occupation and settlement under the mineral laws of the United States, and if so, precisely

what portion, and whether it is desirable to release any of the navigable waters mentioned in the resolution from the limits of said reservation.

In approaching this question, I deem it proper to refer briefly to the character and condition of the Indians occupying the reservation and the situation of affairs as existing amongst them.

There are few Indians in the entire country, if we except the five civilized tribes, who are as far advanced, and even they need not be excepted in any comparison either of their virtues, habits of industry, loyalty, or ambition to attain a higher stage of civilization.

They cultivate the soil extensively, live in comfortable houses, dress like the whites, wear short hair, and in all other respects live and do as white people do. Their houses are painted inside and outside, their barns are well built and commodious, and they have all the improved farm implements and machinery. They own large bands of cattle and horses and an abundance of hogs and poultry.

The Northwest Indian Commission, in the report of its recent visit to these Indians, said:

Each one has a comfortable house on his farm, and nearly all have equally comfortable houses at the mission, which together make quite a village. They remain on their farms during the week days, and on the Sabbath repair to their dwellings at the village to attend religious services and see their children who are at the Mission schools. * * * Long experience in self-reliance and traffic with the neighboring whites has made them cautious, shrewd, and provident in the use of money. We learned that their trade in one town adjacent to the reservation

amounts to about $25,000 yearly. * * * A better ordered and better behaved Indian community can nowhere be found.

Furthermore, the Coeur d'Alene Indians have been for many years the firm friends of the whites. A notable instance of this was the part they took in the memorable Nez Percé outbreak of 1878. They not only shielded and protected the whites in that disastrous war to the fullest extent of their power, but guarded their property at the peril of their own lives, when a large portion of the white population had fled the country for safety.

When peace was restored the people acknowledged their good services and thanked them in formal terms, promising also to assist them in obtaining permanent title to their homes.

I have said this much in order to show that the Coeur d'Alene Indians are quite intelligent and fully capable of understanding their relations to their white neighbors, and that they would be likely to take a sensible view of any proposition for a change of the boundaries of their reservation which public necessity or convenience would seem to require, and at the same time to show that they are deserving of fair and honest treatment from the whites.

The one thing that has given them trouble has been the fear of losing their homes. They have watched the progress of white settlement in the surrounding country, the discovery of valuable mines, the building of railroads, etc., and all this has made them apprehensive lest in some way their reservation might be wrested from them.

In 1884 their agent reported as follows:

The rapid progress they are making, and the great interest manifested by them in their farm work, in their fences, cultivation, in improving the breed of their horses and cattle, and in fact in all things, is commendable.

It was feared in the early spring that the great rush to the Coeur d'Alene gold mines would cause considerable trespassing upon their reserve, but happily so many other routes were opened to them that there were but few crossing the reserve, and now it has nearly ceased.

And again, in 1885:

The Coeur d'Alene on the Coeur d'Alene Reserve in Idaho are flourishing in the highest degree, being wholly independent of the Government, save in the support of their schools and the instruction they receive from their farmer. What they most dread is that their lands will be taken from them some day by the whites, or they be forced to take up small allotments, while now many of them have large fields inclosed with post and board fences, or good substantial rails. Some half-dozen of them have 200 acres of land under cultivation.

And in 1886:

There has been much talk of late by the whites of having their reserve thrown open to settlement, which has troubled Saltice, their chief, very much. He, however, felt somewhat satisfied when I assured him that if such steps were taken by the Government he and his people would receive their land in severalty before the whites would be permitted to enter.

I have taken some pains to ascertain, by reference to the correspondence and otherwise, whether the Indians would be likely to consent to a reasonable reduction of their reservation, and I am satisfied that they would upon

anything like just and reasonable terms, and my own opinion is that the reservation might be materially diminished without detriment to the Indians, and that changes could be made in the boundaries for the release of some or all of the navigable waters therefrom, which would be of very great benefit to the public; but this should be done, if done at all, with the full and free consent of the Indians, and they should, of course, receive proper compensation for any land so taken.

Just what portion of the reservation and navigable waters should be segregated from the reservation, I am unable to say. That, I think, should be determined by negotiations with the Indians.

As bearing upon the subject of the inquiries presented in the Senate resolution, I quote the following from the report of Inspector Gardner, already cited:

On the north and east side of the reserve (Coeur d'Alene) is a section of very mountainous country, known as "Wolf Lodge district." The Indians do not use this, and only occasionally go there hunting for elk and deer. The mountains in this district are said to contain large quantities of valuable minerals. Already prospectors have made their appearance and are only deterred from developing same by occasional presence of the military, who would eject them, and the agent would cause their arrest for trespassing on an Indian reservation. For farming, grazing, or, in fact, for any purpose whatever, this mountain district is approximately valueless to the Coeur d'Alene Indians, but could be advantageously utilized by the whites in developing the mineral resources of same. And, in view of these facts, I see no reason why proper legislation should not be had authorizing the Indians to dispose of their title to same to the United States.

I also quote the following from a report by Special Agent G. W. Gordon, of this Bureau, who visited the Coeur d'Alene Indians upon official business in August last:

There is great eagerness on the part of the whites to locate mining claims on the mineral portion of the reserve, and especially in that section known as "Wolf Lodge," and we found mining claims numerously staked off in that section and in some cases notices posted, though we did not find the parties themselves on the reserve. These mining prospectors are constantly on this portion of the reserve, and it seems next to impossible to keep them off with the means at hand. They are doing no injury, however, further than simply locating mining claims with a view to their possession when that part of the reserve is opened to settlement, as it seems to be believed by them it will be at an early day.

It may be proper to add that the special agent found the Indians decidedly opposed to taking their lands in severalty under the general allotment act. This may be accounted for in part, I think, by the fact that some of them have individually much more land under cultivation than they would be entitled to under that act, and they naturally desire to keep all they have.

Upon this subject the special agent says:

While on the reserve we held a general and well-attended council of the Indians, in order to obtain their views in regard to taking their lands in severalty, and after a clear understanding as to what was desired by the Government, they decided by a unanimous vote adversely to taking in severalty otherwise than they now hold them. These Indians, as you are doubtless aware, are settled on farms of their own selection, are self-supporting and making gratifying progress in agriculture, while

they have good schools and their children generally being educated.

In conclusion I will state that in my opinion these Indians have all the original Indian rights in the soil they occupy. They claimed the country long before the lines of the reservation were defined by the executive order of 1873, and the present reservation embraces only a portion of the lands to which they laid claim. This claim has been recognized in various ways and at sundry times, and the last Congress authorized the Secretary of the Interior to negotiate with them "for the cession of their lands outside the limits of the present Coeur d'Alene Reservation to the United States." Pursuant to that authority negotiations were conducted with them in March last and an agreement concluded, which is now before Congress for ratification. The agreement is published, in House Ex. Doc. No. 63, Fiftieth Congress, first session, pp. 53-56.

It should be stated also that provision is made in said agreement for the removal and settlement upon the Coeur d'Alene Reservation of the Upper and Middle Bands of Spokane Indians, now residing in and around Spokane Falls, in Washington Territory, and also the Calispels, now residing in the Calispel Valley, and any others of the non-reservation Indians belonging to the Colville Agency, and it is confidently hoped and expected that if the agreement is ratified and confirmed the Spokanes, numbering between 350 and 400 souls, will be removed and settled there.

However, there undoubtedly is an abundance of good farming land in the extreme southern portion of the

reservation for all the Indians who will be likely to go there, and much to spare.

I think that when the present agreement shall have been ratified it will be an easy matter to negotiate with them for the cession of such portions of their reservation as they do not need, including all or a portion of the navigable waters, upon fair and very reasonable terms.

In addition to the two maps spoken of in this report, I transmit herewith a tracing of the official map of the survey of "so much of the outboundaries of the Coeur d'Alene Indian Reservation in Idaho as are not marked by prominent natural boundaries and by the surveyed line between Idaho and Washington Territories," as surveyed in 1883 by Darius F. Baker, United States deputy surveyor.

A copy of this report is herewith inclosed, and also the Senate resolution.

Very respectfullly, your obedient servant,

J. D. C. ATKINS,
Commissioner.

The SECRETARY OF THE INTERIOR.

EXHIBIT C.

Senate Ex. Doc. No. 14,
Fifty-first Congress, first session.

Message from the President of the United States, transmitting a letter of the Secretary of the Interior relative to the purchase of a part of the Coeur d'Alene Reservation.

To the Senate and House of Representatives:

I transmit herewith a communication of 16th instant from the Secretary of the Interior, submitting the report, with accompanying papers of the Commission appointed under the provisions of the act of March 2, 1889 (25 Stats., 1002), to conduct negotiations with the Coeur d'Alene tribe of Indians, for the purchase and release by said tribe of such portions of its reservation not agricultural, and valuable chiefly for minerals and timber, as such tribe shall consent to sell, etc., together with the agreement entered into by said Commission September 9, 1889, with said Indians.

BENJ. HARRISON.

EXECUTIVE MANSION,

December, 18, 1889.

DEPARTMENT OF THE INTERIOR,
Washington, December 16, 1889.

The PRESIDENT:

I have the honor to submit herewith a report, with the accompanying papers, of the commission appointed in pursuance of the act of March 2, 1889, making appropriations for the current and contingent expenses of the Indian Department (25 Stats., 1002), to negotiate with the

Coeur d'Alene tribe of Indians for the purchase and release by said tribe of such portions of its reservation not agricultural, and valuable chiefly for minerals and timber, as such tribe shall consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress.

In this report the area of the ceded territory is estimated at 184,960 acres, or 289 square miles, and the consideration agreed upon is the sum of $500,000, to be paid to the said Indians "pro rata, or share and share alike for each and every member of said tribe as recognized by said tribe now living upon said reservation," upon condition that the agreement of March 26, 1887, with said Indians, now before Congress (see House Ex. Doc. 63, Fiftieth Congress, first session, p. 53), shall be duly ratified by Congress.

The commissioners, in presenting this agreement, say:

In consideration of the fact that there is but very little agricultural land in the territory negotiated for, that it is the universal desire of the inhabitants of the Northwest that this land be opened to public domain, the great demand and the scarcity of timber adjacent to this section of the country, the prospect of vast mineral wealth which would be of great benefit to capital seeking investment, and the small value this land is to the Indians, the commissioners deem the bargain an excellent one, the price very reasonable, much lower than could have been expected, and hope that in this purchase you will realize, as they do, the importance of this land being made useful to the growing States and Territories.

T[h]e Commissioner of Indian Affairs in his report herewith reviews the provisions of the agreement and refers to previous reports showing the character and condition of these Indians.

It is believed that this agreement is the best that can be made, and it is submitted with the recommendation that it be transmitted to Congress for such action as may be deemed proper.

I have caused two maps to be prepared for the information of Congress, showing the Coeur d'Alene Reservation and the lands therein ceded by this agreement.

I have the honor to be, very respectfully, your obedient servant,

JOHN W. NOBLE,
Secretary.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, December 7, 1889.

SIR: The fourth section of the act making appropriations for the current and contingent expenses of the Indian Department, etc., approved March 2, 1889 (25 Stats., 1002), provides as follows:

That the Secretary of the Interior be, and he is hereby, authorized and directed to negotiate with the Coeur d'Alene tribe of Indians for the purchase and release by said tribe of such portions of its reservation not agricultural, and valuable chiefly for minerals and timber, as such tribe shall consent to sell, on such terms and conditions as shall be considered just and equitable between

the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and for the purpose of such negotiation the sum of $2,000, or so much thereof as may be necessary, is hereby appropriated out of any money in the Treasury not otherwise appropriated; the action of the Secretary of the Interior hereunder to be reported to Congress at the earliest practicable time.

In pursuance of this provision a commission, composed of Hon. Benjamin Simpson, of Selma, Ala., Hon. John H. Shupe, of Oakland, Oregon, and Napoleon B. Humphrey, esq., of Albany, Oregon, was appointed in May last, and under instructions of June 13, 1889, proceeded to the Coeur d'Alene Reservation in the discharge of its duties, arriving there on the 5th of August following.

The commissioners report that they held frequent councils with the Indians, explored the mineral portions of the reservation lying in the northern part thereof, and finally, on September 9, 1889, concluded an agreement with the Indians whereby they cede and relinquish to the United States a very considerable portion of their reservation, valuable chiefly for minerals and timber, upon terms advantageous as they believe both to the Indians and the Government. The area of the ceded territory is estimated at 184,960 acres, or 289 square miles.

I have the honor to herewith submit the final report of the commission (dated September___, 1888), the agreement entered into with the Indians, and the minutes; or more properly the reports, of the several councils held with them.

The cessation is described in the first article of the agreement as follows:

> Beginning at the northeast corner of the said reservation, thence running along the northern boundary line north sixty-seven degrees twenty-nine minutes; west to the head of the Spokane River to the northwest boundary corner of the said reservation; thence south along the Washington Territory line 12 miles; thence due east to the west shore of the Coeur d'Alene Lake; thence southerly along the west shore of said lake to a point due west of the mouth of the Coeur d'Alene River, where it empties into the said lake; thence in a due east line until it intersects with the eastern boundary of said reservation; thence northerly along the said eastern boundary line to the place of beginning.

The principal consideration agreed upon is found in the second article, which reads as follows:

> And it is further agreed in consideration of the above, that the United States will pay to the said tribe of Coeur d'Alene Indians the sum of $500,000, the same to be paid to the said tribe of Coeur d'Alene Indians upon the completion of all the provisions of this agreement.

Article 3 prescribes the manner of payment as follows:

> It is further agreed that the payment of the money aforesaid shall be made to the said tribe of Indians pro rata, or share and share alike for each and every member of the said tribe as recognized by said tribe now living upon said reservation.

It would appear from the language of the two articles together that the money is to be paid to the Indians per capita, cash in hand.

As, according to the last census, the tribe numbers five hundred and twenty men, women and children, each would receive about $960 of the consideration named.

A further and in itself important stipulation and consideration is found in the fourth article, as follows:

It is further agreed and understood that this agreement shall not be binding upon either party until the former agreement now existing between the United States by the duly appointed commissioners and the said Coeur d'Alene tribe of Indians, bearing date of March 26, 1887, shall be duly ratified by Congress, and in the event of the ratification of the aforesaid agreement of March 26, 1887, to be and remain in full force and effect, but not binding upon either party until ratified by Congress.

The agreement of March 26, 1887, to which reference is meant, was made in pursuance of authority contained in the Indian appropriation act, approved May 15, 1886 (24 Stats., 44), and was submitted to Congress, by the President, January 9, 1888.

The Coeur d'Alene Indians laid claim to a vast area of country outside of their present reservation, including the site of the present flourishing city of Spokane Falls and other now populous communities.

Their claim was based upon original possession and occupancy.

A full history of the case, and the agreement itself, may be found in House Ex. Doc. No. 63, Fiftieth Congress, first session, two copies herewith.

When the Commissioners whose work is now under consideration approached the Indians upon the subject of relinquishment of some of their reservation lands, they

absolutely refused to entertain any proposition of that kind until the old agreement was ratified.

Finally, however, after much argument and entreaty they consented to relinquish the lands the Government proposed to purchase, at the price named ($500,000), upon the express condition that the old agreement should be ratified and carried into effect; and accordingly a provision for the ratification of said agreement was inserted in the new agreement. (Article 4.)

In reporting upon this point the Commissioners say:

The Commissioners were made aware of the stern fact that they were contending with obstacles that threatened to overthrow all business plans they had formed, and presented formidable barriers to the consummation of a treaty. The Indians, while kind and courteous, were reluctant upon business propositions from the fact that other business transactions with them had been neglected; and the failure of Congress to ratify the last treaty, together with the dilatory manner of the railroad company in making payment for right of way, were weapons they used against overtures of the Commissioners for the purchase of any more land. They displayed surprising business sagacity, coupled with an exalted idea of the fulfillment of promises. Much time was consumed in appeasing the grievances they fostered and in establishing confidence with them. They finally consented to dispose of a portion of the land that is included in this treaty, they insisting upon making the lines. The exorbitant price asked, and the small amount of land offered, precluded any bargain, and thus matters stood for two councils following.

After they had been shown the benefits to accrue from the sale of these lands, and the assurance by the Commission of the ratification of the former treaty – a

clause being inserted bearing upon the fulfillment of the provisions of the former treaty – the sale was consummated and the agreement signed accompanying this report.

In consideration of the fact that there is but very little agricultural land in the territory negotiated for, that it is the universal desire of the inhabitants of the entire Northwest that this land be opened to public domain, the great demand and the scarcity of timber adjacent to this section of the country, the prospects of vast mineral wealth which would be of great benefit to capital seeking investment, and the small value this land is to the Indians, the Commissioners deem the bargain an excellent one, the price very reasonable – much lower than could have been expected – and hope that in this purchase you will realize, as they do, the importance of this land being made useful to the growing States and Territories.

It will be proper to state here that it would cost the Government, in money, only $150,000 (Art. 6) and the annual salary of three employés, physician, blacksmith, and carpenter, and the cost of needed medicines (Art. 12) to carry out the provisions of the old agreement, the ratification of which has been heretofore recommended by this office in submitting it to the Department for presentation to Congress; and a bill for that purpose passed the Senate September 20, 1888 (Cong. Record, vol. 19, part 9, p. 8755), but did not reach final action in the House, where it was referred to the Committee on Indian Affairs, September 24, 1888 (*ib.* p. 8893).

This office has no data or information other than that furnished by the Commissioners themselves as to the

value of the lands the Indians agree to cede and relinquish to the United States by the terms of the present agreement.

It has not been the practice to pay such large sums of money to Indians cash in hand as is proposed in this case, but the Coeur d'Alene Indians are far advanced in civilization, and from what is known of their habits and past life it would not be unreasonable to assume that they would make just as good use of their money if paid in this way as they would if it were paid to them in smaller sums or expended for their benefit in the usual manner.

As showing the character and condition of these people, I quote the folowng [sic] from a recent report by this office (February 7, 1888), in response to a resolution of the Senate calling for certain information in respect of their reservation, etc.:

There are few Indians in the entire country, if we except the five civilized tribes, who are as far advanced, and even they need not be excepted in any comparison either of their virtues, habits of industry, loyalty, or ambition to attain a higher stage of civilization.

They cultivate the soil extensively, live in comfortable houses, dress like the whites, wear short hair, and in all other respects live and do as white people do. Their houses are painted inside and outside, their barns are well built and commodious, and they have all the improved farm implements and machinery. They own large bands of cattle and horses, and abundance of hogs and poultry.

The Northwest Indian Commission, in the report of its recent visit to these Indians, said:

"Each one has a comfortable house on his farm, and nearly all have equally comfortable houses at the mission, which together make quite a village. They remain on their farms during the week days, and on the Sabbath repair to their dwellings at the village to attend religious services and see their children who are at the mission schools. * * * Long experience in self-reliance and traffic with the neighboring whites has made them cautious, shrewd, and provident in the use of money. We learned that their trade in one town adjacent to the reservation amounts to about $25,000 yearly. * * * A better ordered and better behaved Indian community can nowhere be found."

Furthermore, the Coeur d'Alene Indians have been for many years the firm friends of the whites. A notable instance of this was the part they took in the memorable Nez Percé outbreak of 1878. They not only shielded and protected the whites in that disastrous war to the fullest extent of their power, but guarded their property at the peril of their own lives, when a large portion of the white population had fled the country for safety.

When peace was restored the people acknowledged their good services and thanked them in formal terms, promising also to assist them in obtaining permanent title to their homes.

I have said this much in order to show that the Coeur d'Alene Indians are quite intelligent and fully capable of understanding their relations to their white neighbors, and that they would be likely to take a sensible view of any proposition for a change of the boundaries of their reservation which public necessity or convenience would seem to require, and at the same time to show that they are deserving of fair and honest treatment from the whites.

The one thing that has given them trouble has been the fear of losing their homes.

They have watched the progress of white settlement in the surrounding country, the discovery of valuable mines, the building of railroads, etc., and all this has made them apprehensive lest in some way their reservation might be wrested from them.

The report of the Commission, the agreement, and council proceedings, with two copies of each, furnished by the Commission, are respectfully submitted for your action and transmittal to Congress as the act requires.

Very respectfully, your obedient servant,

T.J.MORGAN,
Commissioner.

The SECRETARY OF THE INTERIOR

EXHIBIT D.

Senate Mis. Doc. No. 95,
Fifty-first Congress, first session.

LETTER OF THE SECRETARY OF THE INTERIOR TRANSMITTING CORRESPONDENCE IN RELATION TO THE RATIFICATION AND CONFIRMATION OF CERTAIN AGREEMENTS BETWEEN THE UNITED STATES AND THE COEUR D'ALENE INDIANS IN IDAHO TERRITORY.

DEPARTMENT OF THE INTERIOR,
Washington, February 10, 1890.

SIR: I have the honor to transmit herewith, without consideration of the contents thereof by me, a copy of a communication of 8th instant, and its inclosures, from the Commissioner of Indian Affairs in reply to your letter of the 21st ultimo addressed to him in relation to a bill to

ratify and confirm agreements between the United States and the Coeur d'Alene Indians.

Very respectfully,

J.W. NOBLE,
Secretary.

Hon. J.H. MITCHELL,
United States Senate.

DEPARTMENT OF THE INTERIOR,
Washington, February 15, 1890.

SIR: I have the honor to transmit herewith, without consideration of the contents thereof by me, a copy of a communication and accompanying papers of 12th instant from the Commissioner of the General Land Office in reply to your letter of 10th instant addressed to him in relation to a proposed bill to carry out certain treaties with the Coeur d'Alene Indians.

Very respectfully,

JOHN W. NOBLE,
Secretary.

Hon. J.H. MITCHELL,
United States Senate.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D.C., February 12, 1890.

SIR: I have had the honor to receive a letter of the 10th instant from the honorable John H. Mitchell, of the United States Senate, inclosing papers having reference to a proposed bill to carry out certain treaties with the Coeur d'Alene Indians, requesting the return of the papers, with such suggestions as it might be deemed proper to make as to the manner in which the ceded lands mentioned in section 6 of the proposed bill should be disposed of. After an examination of the inclosed draught of a bill, I have to report that I see no reason why the lands referred to should not be disposed of under the general land laws of the United States. The sixth section of the proposed bill seems so to provide, with the exception of a certain tract proposed to be specially disposed of in favor of Frederick Post, in accordance with an understanding with the Indians, and I see no objection thereto.

I send herewith the papers inclosed by Mr. Mitchell with his letter.

Very respectfully,

LEWIS A. GROFF,
Commissioner.

Hon. JOHN W. NOBLE,
Secretary of the Interior.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, February 8, 1890.

SIR: This office is in receipt of a letter, dated January 28, 1890, from Hon. John H. Mitchell, of the United States Senate, inclosing a draught of a bill for the ratification of certain agreements made with the Coeur d'Alene Indians, in Idaho, and making the necessary appropriations for carrying the same into effect, which he desires me to carefully examine, and return to him with such suggestions, if any, as I may have to make in regard thereto.

There are two agreements covered by the proposed bill, one made in pursuance of a clause in the Indian appropriation act of June 30, 1887 (24 Stat., p. 44), and the other of a clause in the Indian appropriation act of March 2, 1889 (25 Stat., 1002). Article 4 of the latter agreement provides that said agreement shall not be binding upon either party until the former agreement shall have been ratified by Congress.

I have examined the draught of a bill submitted by Senator Mitchell, and respectfully submit the following:

AS TO THE FIRST AGREEMENT.

Section 3 of the draft of bill appropriates the sum of $30,000 as the first installment of $150,000, provided for in article 6 of the first agreement, "for the building and erection on said Coeur d'Alene Reservation of a saw-mill and of a grist-mill, each to be operated by steam, for the paying the wages of the engineer, miller, and the employés to be employed in said mills, respectively," etc.

It is clear to my mind that the erection of but one mill, *"a saw and grist mill,"* is contemplated in article 6 of the agreement. The provision of said article is that "there shall be erected on said reservation a saw and grist mill, to be operated by steam, and an engineer and miller employed, the expenses of building said mill and paying the engineer and miller to be paid out of the funds hereby appropriated."

I do not think this language can properly be construed to mean *two* mills – a saw-mill *and* a grist-mill.

The commissioners who negotiated this agreement, speaking upon this point, observe as follows:

These Indians had everything which they needed or wanted, or if not it was within their power to procure it, except a saw and grist mill. It was agreed that the construction of this should be the first item of the expenditure, the cost of this to come out of the $30,000, together with the pay of the engineer and miller. For the probable cost of the mill we beg leave to refer to our report as to the Spokane Indians.

Whenever, either in the agreement or the report of the commission, the word "mill," or "miller," or "engineer," is used, the singular number is employed.

Furthermore, the said draft of bill provides not only for payment of the wages of an engineer and miller, but of "the employés to be employed in said mills, respectively."

The payment of employés other than an engineer and miller is not provided for in the agreement.

It is the established custom of this Office to make annual estimates to Congress of money required to pay

yearly installments due to the Indians under treaty stipulation or agreement, and Congress appropriates only so much as is required to pay such installment.

In the draft of bill presented it will be observed that the whole amount of the money consideration, $150,000, is appropriated at once, all but the first installment of $50,000 to remain in the Treasury and draw interest at the rate of 5 per centum per annum, the same (interest) to be paid to the Indians annually or expended for their benefit. While this plan would no doubt prove beneficial to the Indians, it is not in accordance with the terms of the agreement, but a very decided departure therefrom, providing as it does for the payment of the principal sum in fifteen annual installments of $8,000 each after payment of the first installment of $30,000.

Again. Article 11 of the agreement provides as follows:

It is further agreed that in addition to the amount heretofore provided for the benefit of said Coeur d'Alene Indians, the United States, at its own expense, will furnish and employ for the benefit of said Indians on said reservation a competent physician, medicines, a blacksmith, and carpenter.

Section 4 of the draught of bill submitted makes an appropriation for salaries for such employés and for purchase of medicines, but the appropriation is included in an appropriation of $20,000 for other benefits not provided for in said agreement.

I think it would be better to have separate items of appropriation for each agreement, and that they should

be in strict conformity with the terms of the respective agreements.

AS TO SECOND AGREEMENT.

The only strictly money consideration in the second agreement is in articles 2 and 3 thereof, as follows:

ARTICLE 2. And it is further agreed, in consideration of the above, that the United States will pay to the said Coeur d'Alene tribe of Indians the sum of $500,000, the same to be paid to the said Coeur d'Alene tribe of Indians upon completion of all the provisions of this agreement.

ARTICLE 3. It is further agreed that the payment of money aforesaid shall be made to the said tribe of Indians pro rata or share and share alike for each and every member of the said tribe as recognized by said tribe now living on said reservation.

The draught of the proposed bill appropriates the amount stipulated to be paid to the Indians ($500,000), but provides that $80,000 there of shall be retained in the Treasury of the United States and draw interest at the rate of 5 per centum per annum, to be expended for the benefit of the Indians as therein provided.

I do not doubt that it would be to the interest of the Indians to retain a portion of the money as proposed, but it is not so provided in the agreement, and therefore I do not see how it could be done without first obtaining the consent of the Indians parties thereto.

The appropriation of $20,000 made in section 4 of the draught of the proposed bill, except so much thereof as is for "pay for services of a physician, blacksmith, and

carpenter" and for "purchase of medicines," is not provided for in either of the agreements, and is purely gratuitous.

Neither is the appropriation of $5,000 made in section 5 of the draught for the survey and marking of the exterior boundaries of the reservation, etc., provided for in either of the agreements.

It is desirable, however, that houses should be provided for the accommodation of the agency employés, and that tools and materials should be purchased for the carpenter, blacksmith, and other artisan employés, as provided in the draught of bill submitted (section 4), and if Congress in its generosity will make the needed appropriation therefor I shall be very glad. The outboundaries of the reservation should by all means be properly defined by survey wherever not marked by natural objects, and I trust the appropriation of $5,000 for that purpose will be made.

As to the disposal of the ceded lands, for which provision is made in section 6 of the draught of bill submitted, I have to state that it is a matter of no concern to the Indians themselves nor to this office how said lands are disposed of, since the Indians have no further interest in them, having ceded and relinquished them absolutely to the United States, subject of course to the ratification of the agreement by Congress.

I have caused to be prepared and herewith transmit items of appropriation which I respectfully suggest be substituted for sections 3 and 4 of the draught of bill submitted by Senator Mitchell.

As the law (section 2115, Rev. Stat.) provides that "whenever it becomes necessary to survey any Indian or other reservations or any lands, the same shall be surveyed under the direction and control of the General Land Office, and as nearly as may be in conformity to the rules and regulations under which other public lands are surveyed." I would suggest that the provision in section 5 of the draught of bill that the appropriation of $5,000 for surveys "be expended under the direction of the Secretary of the Interior and Commissioner of Indian Affairs" be amended by striking out the words "and Commissioner of Indian Affairs."

I would further suggest that the draught of bill be referred to the General Land Office for examination and report as to the manner provided for the disposal of the ceded lands in section 6 thereof.

Senator Mitchell's letter and the accompanying draught bill are herewith returned.

Very respectfully,

T.J. MORGAN,
Commissioner.

The SECRETARY OF THE INTERIOR.

EXHIBIT E.

Treaty between the United States and Dwamish, Suquamish, and other allied and subordinate tribes of Indians in Washington Territory. Concluded at Point Elliot, Washington Territory, January 22, 1855. Ratified by

the Senate March 8, 1859. Proclaimed by the President of the United States April 11, 1859.

Treaty between the United States of America and the S'Klallams Indians. Concluded at Point no Point, Washington Territory, January 26, 1855. Ratified by the Senate March 8, 1859. Proclaimed by the President of the United States April 29, 1859.

Treaty between the United States of America and the Makah tribe of Indians. Concluded at Neah Bay, Washington Territory, January 31, 1855. Ratified by the Senate March 8, 1859. Proclaimed by the President of the United States April 18, 1859.

Treaty between the United States and the Walla Walla, Cayuses, and Umatilla tribes and bands of Indians in Washington and Oregon territories. Concluded at Camp Stevens, in the Walla Walla Valley, Washington Territory, June 9, 1855. Ratified by the Senate March 8, 1859. Proclaimed by the President of the United States April 11, 1859.

Treaty between the United States and the Yakama Nation of Indians. Concluded at Camp Stevens, Walla Walla Valley, June 9, 1855. Ratified by the Senate March 8, 1859. Proclaimed by the President of the United States April 18, 1859.

Treaty between the United States of America and the Nez Percé Indians. Concluded at Camp Stevens, in the Walla Walla Valley, June 11, 1855. Ratified by the Senate March 8, 1859. Proclaimed by the President of the United States April 29, 1859.

Treaty between the United States and the confederated tribes and bands of Indians in Middle Oregon. Concluded at Wasco, in Oregon Territory, June 25, 1855. Ratified by the Senate March 8, 1859. Proclaimed by the President of the United States April 18, 1859.

Treaty between the United States and the Qui-nai-elt and Quil-leh-ute Indians. Concluded on the Qui-nai-elt River, in the Territory of Washington, July 1, 1855, and at the City of Olympia, January 25, 1856. Ratified by the Senate March 8, 1859. Proclaimed by the President of the United States April 11, 1859.

Treaty between the United States and the Flathead, Kootenai, and Upper Pend d'Oreilles Indians. Concluded at Hell Gate, in the Bitter Root Valley, July 16, 1855. Ratified by the Senate March 8, 1859. Proclaimed by the President of the United States April 18, 1859.

Treaty between the United States of America and the Molel Indians. Concluded at Dayton, Oregon, December 21, 1855. Ratified by the Senate March 8, 1859. Proclaimed by the President of the United States April 27, 1859. (12 U.S. Stat., p. 927 to 985).

Treaty between the United States and the Blackfeet Indians. Concluded on the 17th of October, 1855, between said Indians and A. Cumming and Isaac I. Stevens, commissioners on the part of the United States. (11 U. S. Stat., p. 657.)

EXHIBIT F.

1101 G STREET, N.W.,
Washington, D.C., February 5, 1886.

GENTLEMEN: I have the honor to make a report upon a letter, copy of which is hereto attached, and made a part hereof, from the Rev. J. M. Cataldo, superintendent of various Indian missions throughout the Rocky Mountain regions of the Northwest, dated Spokane Falls, Wash., January 10, 1886, and which letter has been referred to me by your Bureau for report.

In this communication I am informed that the Spokane Indians, a tribe living in the vicinity of the Spokane Falls, in Eastern Washington Territory, have recently held a council in relation to their past and present grievances, and have requested the said superintendent to write and request me to lay the said matters fully before the honorable Secretary of the Interior.

The two chiefs, Geary and Welsho Louis, seem to have spoken for their tribe.

Geary I have known for thirty-one years. He speaks English, and is now probably near seventy-five years old, for his long, silvery white hair, once so black, as I saw him last October, with a number of his tribe, at the Spokane Falls, indicates that he has seen the snows of many winters. Geary then desired me to present the matter of the wrongs of his Indians to the President of the United States.

The Spokane Indians have been wrongfully treated by the United States, for our people have been permitted to seize their lands without leave or compensation; and

while it is true that a small reservation on the Spokane River has been heretofore set aside and established, by an Executive order, for that temporary purpose, yet this falls very far short of that degree of justice which these people are entitled to at the hands of the United States.

I know well that the late Isaac I. Stevens, when governor of Washington Territory, and *ex-officio* superintendent of its Indian affairs, was authorized to make a treaty with these Indians, with a view of acquiring title for such a portion of their lands as they had no use for, and to compensate them for the same.

I also know that in 1855 it was Governor Stevens's intentions to make a treaty with these Indians on his return from the country of the Blackfeet Indians, now situate in northwestern Montana, the same in 1855 being northwestern Nebraska, where in the summer of 1855 Stevens, having treated with these Blackfeet Indians, his intentions on his return toward the Pacific was to treat with the Spokanes, the Colvilles, and the Coeur d'Alenes.

I also know that when Governor Stevens had concluded a treaty with the Blackfeet Indians, and was proceeding to visit the country of Colvilles and Spokanes, and Coeur d'Alenes, intending, as I have said, to make a treaty with each of said tribes, he was met near the Dearborn River, in northwestern Nebraska, by a special courier coming from the Pacific, and bringing him the intelligence that a general Indian war was then raging thoughout the western portion of Oregon and Washington Territories, which, the Indian Department will bear witness, continued for a period of two years.

In consequence of this fact Governor Stevens deemed it his duty to proceed immediately to the seat of government at Olympia, on Puget Sound, but failed to conclude any treaty negotiations with either the Colville, Spokane, or Coeur d'Alene Indians. The exact recital of some of the delays relating to this matter I now give in the words of Mr. Gustavus Sohon, who then was with Governor Stevens as guide and interpreter, and to whom I hereinafter more particularly refer. Mr. Sohon says:

The treaty made by the United States through Hon. Isaac I. Stevens, then governor and superintendent of Indian affairs of Washington Territory, and concluded at Walla Walla, in Washington Territory, in 1855, included certain Indian tribes residing east of the Cascade Mountains, on the borders of eastern Oregon Territory and southeastern Washington Territory, and lying west of the Bitter Root Mountains. These tribes were the Yakamas, Umatillas, Walla Wallas, and the Nez Percés; and Governor Stevens, as superintendent of Indians affairs for Washington Territory, in making these treaties, acted jointly therein with General Palmer, then commissioner of Indian affairs for the then Territory of Oregon.

The camps of said Indians were near the council grounds, and there were also present a few Spokane Indians, with Chief Geary, although his tribe and that of the Coeur d'Alene Indians, both of Eastern Washington Territory, were not joined in any of these treaties.

Governor Stevens next proceeded to treat with a tribe of Indians living at the extreme eastern portion of Washington Territory. He passed through the country of the Spokanes and the Coeur d'Alenes, not stopping at that time to treat with either of them, but went first into the Flathead country, where he made a treaty with the tribes living between the Bitter Root Mountains and the main

ridge of the Rocky Mountains, said tribes being as follows: The Flatheads, the Pend d'Oreilles, and the Kooteneys. Now, these three tribes, and also the Nez Percé tribe, already treated with by Stevens at Walla Walla, were in the habit (owing to their location) of hunting buffalo in the Rocky Mountains, on the plains of the Upper Missouri and the Upper Yellowstone rivers, and there they frequently met at war the Blackfeet tribes making traveling always unsafe. But Governor Stevens took with him several representatives of all these tribes, and crossing the Rocky Mountains into the Blackfeet country, which, at that time, as I have stated, constituted a portion of the Territory of Nebraska, he met General Alfred Cummings, then commissioner of Indian affairs for the Territory of Nebraska, and acting jointly therein they treated with said tribes, to wit: The Piegan, the Blackfeet, the Blood, and the Gros Ventre, not only for their lands and peace with the United States, but also for peace between the several tribes on the east and those then living on the west of the Rocky Mountains. This last council for these purposes was held at the junction of the Judith and Missouri rivers, seventy miles east and below Fort Benton.

It was now November when Governor Stevens started on his return to the Territory of Washington and where he was to complete a treaty with the Spokane, Covilles, and Coeur d'Alenes, but before reaching the country of these Indian tribes he met, on the Teton River, 8 miles above Fort Benton and 500 miles distant from the Spokane country, a special mounted courier, bringing him a report that the Indians at Walla Walla, and other tribes with whom he had lately treated, had broken out in rebellion and were then in open war.

On the same night Governor Stevens procured additional arms and ammunition and started westward with his party, the governor himself, with two or three men,

going in advance to the Bitter Root Valley, thereby gaining a few days' time within which to transact important Governmental business and until his pack train should have reached Hell Gate Ronde, now the city of Missoula, in the Territory of Montana. We continued our journey across the Coeur d'Alene Mountains on November 21, 1855, and reached the place of residence of Antoine Plant, a prominent Indian of his day, then living on the north bank of the Spokane River. This was at the end of November, 1855. We found here several white men traveling, who could not proceed further on account of said hostile Indians.

A party of Coeur d'Alenes and some Spokanes, with their chief, Geary, came to Governor Stevens's camp and asserted their friendship for the whites, though the main portions of their tribes were not present. Of course a treaty could not and was [not] expected at that time by the Indians and also by Governor Stevens, that he would re-not concluded with these Indians then and under all the circumstances, but it was turn and attend to making a treaty with these Indians at some suitable time and in the early future; but successive Indian wars and other difficulties during the administration of Governor Stevens in Washington Territory, that lasted several years, did not afford him any such suitable opportunities to treat with these Indians nor to provide for them in any proper way.

We thereupon moved to Lapwai, in the country of the Nez Percé Indians, where those Nez Percé chiefs who had accompanied us met a large camp of their people, and here they held a council and offered Governor Stevens a company of warriors of these friendly tribes, which joined the Governor's party, when we proceeded to meet the hostile Indians. But before reaching Walla Walla we were met by several companies of volunteers from Oregon and Washington Territories, who had been sent out by Governor Curry, then governor of Oregon Territory, to

meet and to protect us; and which volunteers had attacked the hostile Indians just the day before and had put them to flight.

I have thus at some length stated historically the exact reasons why no treaty arrangements were made with these particular tribes at that time, or since. I have to say of these Indian tribes, to wit: The Spokanes, Colvilles, and Coeur d'Alenes, that during these two years of Indian warfare in western Oregon and western Washington Territories, these three Indian tribes remained at peace with the United States, and when the Indian war had ended the Government of the United States made ample, if not liberal, provision for all the Indian tribes that had been then so recently at war, but it seemed then to have entirely overlooked these three Indian tribes that had remained at peace.

This condition of things continued until 1858, when two of these tribes, to wit, the Spokanes and Coeur d'Alenes, and it may possibly be some few of the Colvilles, restive and feeling aggrieved at the wrongs that the United States Government had perpetrated upon them, made a war upon the white population then in eastern Washington Territory, and during which time the large military force under Colonel Steptoe, of the United States Army, was most signally defeated and driven from their country. The defeat of these United States forces resulted, however, in calling to the field a still larger military force, under General George Wright, United States Army, who, after a number of engagements with these two Indian tribes, finally brought them to peace. I was General Wright's aid, and was with him at this time, and so also was Mr. Sohon, as guide and interpreter.

Thereafter, the Government of the United States, by an executive order only, placed the Coeur d'Alene Indians upon the reservation which they now occupy, but it failed to compensate them or the Colvilles or the Spokane tribe, or to make any compensation for the latter two tribes for the large district of country which was then, and ever theretofore had been, their land and that of their forefathers.

The Spokane and Colville Indians are now very poor, and, in my opinion, it is the duty of the General Government to deal with these Indian tribes generously; certainly to make ample provision to compensate all three of these tribes for the large bodies of land that it is permitted to be occupied by our people. And in addition thereto they should dedicate and grant a reservation as a place for their home and permanent abode.

Having been in their country as early as 1853, and frequently since, I am therefore familiar with much that I herein state as to these people, as to their country, as to their wants, as to their wrongs; and I submit that it would be a grave injustice for our Government now to permit this condition of things long to continue. Had I the time, having as I have the disposition, I would gladly place it at the disposal of the Interior Department, without compensation, to visit these tribes and to bring to Washington City, with the permission of that Department, a delegation from each thereof, and enable them to lay their wants in detail before the proper Departments, and to enable the United States to enter into such preliminary arrangements with these Indian tribes as would finally eventuate in a proper and just treaty between them and the United States, and by which an adequate compensation could be

had for the value of the lands of which, in my opinion, they have been so wrongfully divested. But I have not such leisure at this time, but I have the honor to bring to the special notice of the honorable Secretary of the Interior a gentleman whom I know to be in every respect qualified to fill this commission, to wit, the party whom I have hereinbefore named, to wit, Mr. Gustavus Sohon, now living at 504 Eleventh street northwest, Washington D. C. Mr. Sohon, during my several expeditions across the Rocky Mountains prior to 1862, acted as my guide and interpreter, speaking at that time the languages of those people. He enjoys the confidence of all those Indians, as he also does that of the whites in the city of Washington, and in the Territories of Washington, Idaho, and Montana.

Mr. Sohon came to Washington City with me in 1862, and has resided here ever since. He is honest, capable, faithful, and zealous in the cause of Indian civilization, and I suggest to the honorable Secretary of the Interior the propriety of appointing him as a special agent, with authority, under the auspices of and at the expense of the Indian Department, to proceed to east Washington and northern Idaho Territories for the purpose of there conferring with these tribes of Indians, to wit, the Spokane, Colville, and Coeur d'Alene, and to bring back with him to Washington City a delegation of at least three to five of their principal men, with a special interpreter for each tribe, in order that they may have an interview and an understanding with the Commissioner of Indian Affairs, the Secretary of the Interior, and the President of the United States in regard to the subject-matter of their wrongs, of their wants, and of the remedies therefor.

Mr. Sohon, having been present with Governor Stevens thirty years ago when he concluded the aforesaid treaties, he being to-day one of the very few men living who was a witness of the transactions had between the United States and the several Indian tribes herein named or referred to, is, in my opinion, the person above all others to be commissioned to execute this important trust.

In this connection permit me to invite your attention to a communication relative to one of these tribes, which has been heretofore filed in the Indian Office, and marked A and made a part hereof.

Should the honorable Secretary of the Interior desire to see me in person in reference to any of the matters herein contained, I will promptly obey any citation he may issue to me in the premises.

In support of portions of the recitals herein made relating to the several treaties concluded by Governor Stevens with the aforesaid Indian tribes in 1855, I refer you to the United States Statutes, vol. 11, p. 657 *et seq.*, and vol. 12, pp. 945 to 979; wherefore, in conclusion, I suggest and recommend that the honorable Secretary of the Interior may address a special letter to Congress, now in session, requesting an appropriation of a sum not less than $10,000 with which to defray the expenses of the commission which I herein suggest and recommend may

be created for the purpose of securing the results herein outlined.

I am, yours, very respectfully,

JOHN MULLAN.

The BUREAU OF CATHOLIC INDIAN MISSIONS,
Washington City, D. C.

Exhibit G[1].

WASHINGTON, D. C., *November* 24, 1885.

SIR: By direction of this Bureau I have the honor to hand you herewith the petition of Seltise, the head chief of the Coeur d'Alene Indian tribe, in Idaho, in behalf of his people, addressed to you through this Bureau, in which he sets forth the wrongs done them by the United States in taking their lands without remuneration, and asks that you will bring the same to the attention of Congress, and that his petition, with the accompanying papers, will be incorporated in the report of your special committee to Congress.

This Bureau most cordially and earnestly indorses the prayer of Seltise, and trusts that you, your committee, and Congress will take favorable action upon the same.

Very respectfully, yours,

CHARLES S. LUSK
Secretary.

HON. W. S. HOLMAN,
Chairman Special Committee to Inquire into Indian Matters.

EXHIBIT G[2].

COEUR D'ALENE RESERVATION,
Idaho Territory, October 30, 1885.

SIR: As chief of the Coeur d'Alene Reservation of Idaho Territory, I beg to say that my people and myself looked forward with much interest and hope in the firm expectation that you would visit our country and my people, as it would have given to us the most favorable opportunity to lay before you and your honorable committee our wants, and what we expect from the United States Government towards us.

In view of these facts, I, therefore, in the name of my people and tribe, now send you a copy of the petition which we have heretofore, to wit, on the 23d day of March, 1885, caused to be forwarded to the honorable Commissioner of Indian Affairs, and we now ask you and your honorable committee that you would make due reference to our case, and that you may be pleased to incorporate our said petition in your report to Congress on Indian matters, in order that the attention of the United States Government shall be drawn to the great grievances that have been so long inflicted upon my people.

I am, sir, yours, respectfully,

SELTIS,
Chief, Coeur d'Alene Indian Tribe, Idaho.

HON. W. S. HOLMAN,
Chairman Special Committee House of Representatives,
Authorized to visit the Indians and Indian Reservations.

EXHIBIT G[3].

COEUR D'ALENE INDIAN RESERVATION,
Territory of Idaho, March 23, 1885.

To the President of the United States and the Secretary of the Interior, and the Commissioner of Indian Affairs:

SIRS: Your petitioners, the Coeur d'Alene Indian tribe, now residing in the northern portion of the Territory of Idaho and west of the Rocky Mountains, desire to hereby make known to you the fact that their rights as Indians have, up to this date, been very largely neglected by the proper authorities of the United States, by reason of which a large and valuable portion of their country has been taken possession of and is now used, cultivated, and occupied by the whites, and without any compensation or indemnity ever having been given them therefor.

Your petitioners are now, and for many years last past have been not only friendly to the whites, but they remind you of the fact that when Joseph's band of Nez Percés in 1877 rose in rebellion against the United States, resulting in the loss of many valuable lives of your people, and in great cost to your Government, and when a large portion of the white male population in the Territories of Idaho and Washington, with their wives and children, fled from their homes and from the country, that it was your petitioners who went to their rescue and protected them and their homes and their property, at their own expense and at the risk of their lives, until such a time as peace and confidence had been restored, and until the return to their homes of said white population; and your petitioners now submit herewith, in papers marked

A and B, by copy, the evidences of said white population of the said acts of your petitioners at that time.

The boundaries of the country owned by your petitioners and by their forefathers from time immemorial are as follows, to wit: Beginning at a point on the Pelouze River west of a high butte now known and called Steptoe Butte; thence extending northwestwardly to the Spokane River at a point on its north bank formerly resided at by Antoine Plant, a half breed Indian; thence extending to the lower end of the Pend d'Oreille Lake; thence eastwardly to the summit of the Coeur d'Alene Mountains, separating the waters of the Flathead or Missoula River from those of the Coeur d'Alene and Saint Joseph's River; thence southerly along the summit of said mountains to the most southern thereof, whence flow the waters of the Pelouze River; thence westwardly along the southern rim of the water-shed of the waters of the Pelouze River to the point of beginning.

That all the lands of your petitioners, so by them owned and herein described, have been taken possession of by the whites without remuneration or indemnity, except that portion now by them occupied as the present Coeur d'Alene Reservation.

That within the country so described is situated one of the most valuable portions of the lands of Washington Territory; that it is now dotted by numerous and valuable wheat farms, with many forests of valuable timber, much of which has been and is now being cut and floated down the Spokane River to Spokane Falls and there converted into lumber; besides, there are numerous saw-mills for the same purpose at many other points therein. It also

includes the Coeur d'Alene gold, silver, and lead mines, said to be extensive and rich. It includes the Coeur d'Alene Lake and Coeur d'Alene River, upon the waters of which steamers now run. It includes the beautiful site of the military fort at Coeur d'Alene, besides numerous thriving towns and villages. It includes the line of the Northern Pacific Railroad from near Spokane Falls to the Pend d'Oreille Lake, and it also includes one of the valuable portions of the land grant to the Northern Pacific Railroad Company. Your petitioners understand that Congress in its act approved July 31, 1854 (U.S. Stats., vol. 10, page 330) gave authority and made liberal provision for negotiating treaties with all the Indian tribes then in Washington Territory, at which date all the lands of your petitioners, herein described, were situated in said Territory, all of which lands they then occupied unmolested and upon which they were then residing.

Your petitioners further understand that the late Isaac I. Stevens, then governor of Washington Territory, and *ex officio* superintendent of Indian affairs, was by the President duly authorized and empowered to negotiate said treaties, and, among other tribes, with that of your petitioners; that in the execution of this task said Stevens made treaties with all the tribes on Puget Sound and along the Columbia River, extending to the Nez Percés country, and that he was then directed to proceed to Fort Benton and there assist in making similar treaties with the Blackfeet, Gros Ventres, and other tribes of wild Indians, as provided for in that same act of Congress; that while on his way to execute said trust, in the summer of 1855, Stevens made, at the Hell Gate Ronde, treaties with the Flathead, Upper Calispels, or Pend d'Oreilles, and

certain Kootenai Indians, by which the Jocko Indian Reservation was established.

Your petitioners further know that it was Stevens's intention on his return trip westward to negotiate similar treaties with your petitioners, and also with the Spokanes, Pelouze, Lower Calispels, and other Kootenai Indian tribes; but that upon reaching the country of your petitioners at the above mentioned locality, on the northern bank of the Spokane River, formerly resided at by the half-breed Antoine Plant, where a large number of our people had already met with a view to enter into a treaty with your Government, Stevens learned for the first time, by a mounted messenger, that the entire portion of Oregon and Washington Territory was engaged in a general Indian war; that he departed instantly from that portion of the country, and failed to enter into any treaty with us or meet any of said other tribes of Indians herein last named. Since then nothing has been done in regard to negotiating a treaty with your petitioners that the Government then authorized and intended should be done.

It is a public matter, within your own knowledge, that all the treaties as then negotiated by Stevens with the Indian tribes, in 1855, have been duly ratified, confirmed, and fully executed by the United States with said tribes, to wit: With the Dwamish, Squamish, and other allied tribes; with the Skallams, Makahs, Walla Walla, Cayuse, and Umatillas, Yakamas, Nez Percés, and Quinaielts, Flathead, Kootenais, and Upper Pend d'Oreilles (see U. S. Stats., vol. 12, pages 927 to 1879). Your petitioners desire still to maintain peace with the whites, and especially with those whites to whom their country, described as

aforesaid has become valuable, and by whom the same is now largely occupied.

Our people now need grist and saw mills, proper farming implements, and mechanics to help to teach us and our children proper industrial pursuits, and the use of tools in connection therewith, and, in addition to this, we need some cattle and sheep. We do not need much money, but we do need all the things therein named, all of which should be given us at an early date, and ample provision made and guarantied for our young men and women when starting in married life.

The missionary fathers and good sisters and brothers many years ago came in our midst, and all we now know of tilling the soil and living like white people we and our children have learned from them. They have built at their own expense our school-houses and schools in our midst and for our exclusive benefit, and inclosed and cultivated the same to support our little children, whom they teach; and when this tribe removed, in 1877, to the place they now occupy, your petitioners marked off a mile square each for the fathers and sisters as farming fields and a mile square of timber, all of which we want the Government to confirm to these fathers and sisters when concluding a treaty with us.

In view of all these matters, therefore, your petitioners now ask that you may be pleased to send them a proper commission of good and honest men, authorized and empowered to consider all these facts and such other facts as their visit to us may disclose, and to provide for our present and future wants, and to make with us a proper treaty of peace and friendship, and enter into such

proper business negotiations under and by which your petitioners may be properly and fully compensated for such portion of their lands not now reserved to them; that their present reserve may be confirmed to them, except such as may be confirmed to the missionary fathers and sisters, and that ample provision be made by the United States by which their compensation shall be annually made them partly in stock, tools, mills, and mechanical instruction by proper mechanics, for the permanent benefit of every member, young and old, male and female, of the Coeur d'Alene tribe of Indians. And your petitioners will ever pray for the permanence of your good government and for the welfare of all those who properly administer its public affairs.

N.B. – This petition has been written by Louis Kaizewet, one of the boys now being educated at the Coeur d'Alene Indian mission school.

(Signed with cross-mark by:)

Andrew Soltis, head chief; Damas, chief; Edward, chief; Regis, chief; Bartholomew, chief; Venceslas, chief; Bernard Speknmilko; Tecomta; Peter Wilsoleyn; Daniel; Sebastian; Alphonse; Gregory; Charles Louis; Helarion; Pat. Davenport; Louis Sepis; Adrian; Triburtins; Ignace; Ererechin Bassau; Joseph Npagamusu; Barnaby Chuoa; Andrew John; Nicodeme Crontons; Leo Emnteynza; Lolo Chompaskat; Peter Joseph Jahurn; Gami Genzalkan; Leo Gnakaize; Paul Tkainse; Ignatius Ngaiana; Basil Guignizu; Alexander Chilchelgo; Stephen Thamzin; Peter Lupsqui; Henry Guistchene; Simon Chemeneme; Fidele Sermenzu; Louis Sauaualko; Isidore Npapsqua; Basil Sepnai; Peter Joseph; Eliemae Chedalem; Peter J. Syolgui;

Stephen Zeotagan; Benoit Enchiezn; Benoit Tholize.

Signatures of witnesses to the Indians:

JOHN P. SWENEY,
Additional Farmer, Colville Agency.

FRANK P. CONNELL.

T. EVANS.

THOMAS J. PURCELL.

BERNARD CUNNINGHAM.

EXHIBIT G[4].

A.

PINE CREEK, NEZ PERCES COUNTY, IDAHO TERRITORY,
June 19, 1877.

To the Priest, Chiefs, and the Coeur d'Alene Indians:

GENTLEMEN: We, the undersigned citizens of Pine Creek and surrounding country, feel truly thankful to you all for your kindness toward us during the present excitement, and for the trouble and the pains you have taken in assuring us that there was no danger.

We did not leave Pine Creek for fear of you, but for fear of other Indians; and in return for your kindness we, the undersigned citizens, are willing to assist you in petitioning Government to grant you a good title to your land, that you may lead a quiet and peaceful life, and we are willing to do anything in our power to promote the peace and happiness of you, Coeur d'Alenes.

(Signed:) N. M. Morris, M. A. Morris, H. S. Fanny, R. U. Young, B. F. Price, N. T. Price, T. W. Gholson, M. E. Gholson, B. A. Truax, S. A. Truax, M. Fountain. Thomas Booton, Frank Roctor, Jesse Walling, Harriet Walling, C. L. Chalwell, W. B. McJale, Caleta McJale, J. M. Pupst, A. E. Pupst, F. R. Martin, Mary A. Martin, F. E. McGrelen, W. H. Landes, Sanuk Welch, R. F. Stare, H. W. Walts, R. Price, Javah Price, G. O. Briggs, John Cummings, Martha Cummings, London C. Twine, J. F. Conkling, L. W. Davenport, Mary Davenport, John Moore, Editte Moore, Adin Davis, Jane Davis, Mary Fountain, M. W. Smith, F. C. Hayes, J. M. Woody, Lafayette Mary, Elizabeth Munes, F. M. Barm, Alrz. N. S. Barm, Lurindo Mone, Ana Mone, Sam Prere, W. T. Skigy, R. R. P. Romer, W. Brewer, Lene Brewer, Arthur Green, F. P. Connell, Miss S. Connell, F. D. Wazkeild, G. H. McQueen, L. McQueen, G. W. Truax, H. Truax, W. A. Hone, S. Grumley, Selena Grumley, Samuel Mone, Susane Mone, G. Y. Quaeler, Mary Campbell, Franklin Rector, Henny Edyson, C. S. Barton, R. J. Looch, Z. Smith, J. W. Smith, Charles Mone, S. J. More, Betz More, Lidia More, Andrew A. Rice, Agnes Brallam, Minna Brallam, P. Gilbert, Enuch Peoka, Oro Rector, S. D. Young, Fr. McCarrie, Sarah McCarrie, A. J. Price, Jack Sullivan, Msj. Lemh.

EXHIBIT G[5].

B.

LEWISTON, IDAHO, *August* 25, 1877.

The undersigned take pleasure in acknowledging the loyalty of the Coeur d'Alene Indians, and particularly Soltise, their head chief, through all the excitement attending the outbreak of the non-treaty Nez Percés.

When the settlers from Pine Creek left their homes for fear of Indian hostilities, Soltise assured them of the friendship of the Coeur d'Alenes, and even sent some of his people to guard their property until their return. His influence is great among the northern Indians, and it has been used to maintain peaceful relations between the whites and the Indians.

(Signed:) W. W. Johnson, F. Rector, P. Gilbert, A. H. Davenport, Aretar Cox, Edgar Davenport, Lincoln Davenport, Benjamin Hok, Robert Twart, D. M. Ringer, G. W. Chambert, E. Baldwin, J. H. Billups, L. W. Davenport, Po. Canty, W. B. Slefall, F. J. Hayfold, James Turner, F. E. McQueen, Willie A. Hone, W. Smith, J. Po. Lipvionile, E. C. Watkins, United States Indian inspector, M. C. Wilkinson, aide-de-camp, A. Brig. Gen. O. O. Howard, G. H. McQueen, J. V. Naughte, H. W. Walls, B. A. Price, James Ewart, Robert R. Hargrove, R. A. Truax, W. Brewer, H. Ephy, J. M. Propst, T. W. Gholson, W. H. Landes, Thomas Turner, W. M. U. Boun, S. D. Stephen, T. R. Mastin.

EXHIBIT G[6].

COLVILLE INDIAN AGENCY,
March 26, 1895.

SIR: I have the honor to inform you that the head chief, chiefs, and head-men of the Coeur d'Alenes have forwarded you a petition, to be transmitted by you to the Indian Department, wherein they give you a condensed history of their tribe and their desires. I would respectfully state that, officially and otherwise, since 1861, I have personally known many of the signers to the petition. In 1866, when agent for the Nez Percés at Lapwai, I was directed by Governor Ballard, *ex officio* superintendent of Indian affairs for Idaho, to proceed to the country of these people, and learn whether they desired to remove to the Flathead Reservation; or, if not, to select in their own country a suitable place for their reservation. Upon that visit I saw that they were workers *then* when it was considered by an Indian a disgrace to work, and when it was almost impossible to procure the necessary implements to work with, but in their fences and in what little farming could be done, where they were then located, they showed thrift and progress totally unexpected in *that* day. In 1875 "Nicodemus," one of the tribe, first commenced farming upon the present reserve. In the spring of 1876 two or three more opened small farms. In 1877 or 1878 they all commenced making small farms in different localities upon the reservation from "Stallams" village, farms near the Spokane River near Crowley's bridge, running south to the present mission nearly 40 miles, embracing within that distance some six or seven villages, the largest being near the present mission (De Smet) at the head of the Latah or Hangman Creek. Nearly

200 farms have been opened. For the first two or three years they struggled along as best they could, being poor and unable to purchase the necessary farming implements.

The only help they had was through the father connected with the mission, in furnishing plows and other tools and advice. At the present time their farms, houses, etc., show the effect of the good teaching they have received. All the males are good farmers, many of them (the older ones) having two or three hundred acres of land under a good substantial rail fence, and under cultivation. The younger men of the tribe, equally as good workers and fully as willing, but receiving no aid from the Government, except in their schools, have not the means to go ahead as they would wish. With the exception of one or two trappers (old men), all are farmers. You see no long hair worn by them, no blankets, no moccasins, *all* men and women wearing the dress of the whites. By their own labor and exertions so far (with, as before stated, the schools excepted), they have accumulated about 150 farm wagons, 8 or ten spring-wagons, 160 plows, harness, mowing and reaping machines, sulky-plows, etc.

They have a fine church, largely contributed to by themselves, in which about 200,000 feet of lumber was used in its construction, and costing nearly or quite $4,000. In educational matters they are deeply interested, as you have seen when visiting their schools. With proper encouragement they can become happy and prosperous people.

To you who have accomplished so much and given them so much good advice and encouragement since you have been their agent, they look for help in this matter. They say no agent has ever done so much before for them, and I would respectfully ask of you your earnest endeavors to accomplish for them what is asked in their petition.

Very respectfully, your obedient servant,

JAMES O'NEIL,
Resident Farmer, Coeur d'Alene.

Hon. SIDNEY D. WATERS,
United States Indian Agent, Colville Agency.

EXHIBIT H.

COMMITTEE ON APPROPRIATIONS,
HOUSE OF REPRESENTATIVES,
Washington, D. C., March 31, 1886.

SIR: The inclosed letter of Mr. Lusk and its accompanying petition from the head chief of the Coeur d'Alene Indians, not being within the jurisdiction of the select committee of the House charged with making certain inquiries touching Indian Affairs, etc., was not embraced in their recent report, but is respectfully referred to your Department for consideration.

Very respectfully,

WM. S. HOLMAN,
Chairman Select Committee on Indian Affairs, etc.,
House of Representatives.

Hon. L. Q. C. LAMAR,
Secretary of the Interior.

EXHIBIT I.

SPOKANE FALLS, WASH., *January* 10, 1886.

DEAR SIR: Several Spokane Indians came to see me yesterday, and they told me to write to you to help them to get a piece of land as their own reservation. Geary and Welsho Louis, both head chiefs, made speeches and spoke very forcibly to show their rights. Welsho Louis wants you to obtain for him the privilege to go to Washington with one or two of his men, so that he himself could tell to the President the miserable condition in which more than four hundred people of his tribe are since the coming of the whites into their territory.

The United States agents at Colville and several of the fathers have tried their best for several years to persuade them to go into some reservation, but they stubbornly objected to this; they say they want to be a nation as God made them, and if they can not obtain that they prefer to die than to be subjected to any other Indian tribe.

Please let them hear from you as soon as you conveniently can.

They even object to go to Washington with any people of any other tribe. To hear them you would believe that their national pride is not less than that of the old Romans.

Very respectfully, yours,

JOS. M. CATALDO, S. J.

Capt. JOHN MULLAN.

EXHIBIT 189

CONGRESSIONAL RECORD - SENATE.

[June 7] 1890. [Page] 5769

AGREEMENTS WITH COEUR D'ALÊNE INDIANS.

The bill (S. 2828) to ratify and confirm certain agreements with the Coeur d'Alêne Indians in Idaho Territory, and to make the necessary appropriations for carrying the same into effect, and for other purposes therein named was considered as in Committee of the Whole.

The Secretary proceeded to read the bill.

Mr. DAWES. I think the Senate will consent to omit the reading of the long list of Indian names which is contained in the bill.

The PRESIDING OFFICER. They will be omitted, if there be no objection. The Chair hears none.

Mr. MITCHELL. I suppose the amendments might be read now.

The PRESIDING OFFICER. The first amendment reported by the committee will be read.

Mr. MITCHELL. Omitting the names of the Indians, on page 18 is an amendment of the committee, inserting a new section as section 4.

Mr. BLAIR. I think those names ought to be read.

Mr. MITCHELL. Oh, no, Mr. President.

Mr. DAWES. Really no mortal man can read them at all. They might be printed in the RECORD if the Senator from New Hampshire desires.

Mr. MITCHELL. The Senator from New Hampshire could not pronounce them himself.

Mr. BLAIR. I would not pronounce them in the Senate.

Mr. SPOONER. The Senator from New Hampshire wants to demonstrate the necessity for the educational bill, I suppose.

The PRESIDING OFFICER. The Chair is advised that the reading of the bill has not been concluded. The reading will be continued, omitting the names.

The Secretary resumed and concluded the reading of the bill.

The first amendment reported by the Committee on Indian Affairs was, in section 3, on page 16, line 19, after the word "agreements," to strike out:

The remaining $120,000 of the said $150,000 shall be paid in fifteen equal annual installments of $8,000 each, after the payment of the first installment of $30,000, the first of said fifteen annual installments to be paid on the ___ day of ___, 18___, and the said sum of $120,000 is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, in order to meet such annual installments, respectively, said installments to be paid to said Coeur d'Alène Indians annually as aforesaid by the United States, and to be expended in the manner and for purposes as recited in article 6, or 7, or 8, or 9, one or all of the first of said agreements.

The amendment was agreed to.

The next amendment was, in section 3, line 35, before the word "thousand," to insert "hundred;" so as to read:

> And for the purpose of meeting the requirements of articles 2 and 3 of the second agreement aforesaid, the sum of $500,000 is hereby appropriated, etc.

The amendment was agreed to.

The next amendment was to strike out sections 4 and 5, as follows:

> SEC. 4. That for the pay of the services of a physician, blacksmith, and carpenter and for the purchase of medicines for said Coeur d'Alène tribe of Indians, the sum of $___ be, and the same is hereby, appropriated out of any moneys in the Treasury not otherwise appropriated. There is also hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, the additional sum of $___, to be used in the building of suitable houses for the accommodation of the agency employes on said Coeur d'Alène Indian reservation, and for the purchase of necessary tools and materials for use by the carpenter, blacksmith, and other artisan employés, and also for the purpose of definitely surveying and determining the outboundaries of the said Coeur d'Alène Indian reservation, wherever not marked by natural objects, the sum of $5,000 of the foregoing amount, or so much thereof as may be necessary, to be used for this purpose, the same to be expended under the direction of the Secretary of the interior.
>
> SEC. 5. That all lands so sold or released to the United States, as recited or described in both of said two agreements shall, upon the passage

of this act, be subject to the operations of the land laws of the United States, applicable to the disposal of lands in the State of Washington and in Idaho Territory, and which law are now hereby extended thereto.

Mr. DAWES. The Senator from Oregon [Mr. MITCHELL] desires to offer an amendment at that point.

Mr. MITCHELL. I desire to offer an amendment to the amendment of the committee.

The PRESIDING OFFICER. The Secretary has not completed the reading of the amendment of the committee. When that has been completed the amendment of the Senator will be in order.

Mr. COCKRELL. Let the amendment that is to be amended be reported.

Mr. MITCHELL. Has the amendment of the committee been read?

The PRESIDING OFFICER. The reading has not been completed. The committee propose to insert in lieu of what has been stricken out what will now be read.

The SECRETARY. It is proposed to insert in lieu of sections 4 and 5 the following:

SEC. 4. That all lands so sold and released to the United States, as recited or described in both of said agreements, shall, on the passage of this act, be restored to the public domain, and shall be disposed of by the United States to actual settlers only, under the provisions of the homestead law and under the law relative to town sites: *Provided*, That each settler, under and in

> accordance with the provisions of said homestead act, shall pay to the United States, for the land so taken by him, in addition to the fees provided by law, the sum of $1.25 per acre, and shall be entitled to a patent therefore, in accordance with said homestead laws, and after the full payment of said sums; but the rights of honorably discharged Union soldiers and sailors, as defined and described in sections 2304 and 2305 of Revised Statutes of the United States, shall not be abridged, except as to the said sum to be paid as aforesaid.

Mr. MITCHELL. I offer the amendment which I send to the desk to come in after the word "agreements," in line 2 of the new section 4.

The PRESIDING OFFICER. The Senator's amendment will be stated.

The SECRETARY. After the word "agreements," in line 2 of section 4, it is proposed to insert "and not heretofore granted;" so as to read:

> That all lands so sold and released to the United States, as recited or described in both of said agreements, and not heretofore granted, shall, on the passage of this act, be restored to the public domain, etc.

Mr. MITCHELL. The object of this amendment is simply to preserve the rights of any parties who may have acquired rights from these Indians prior to the execution of this agreement.

Mr. REAGAN. I move to amend further, after the word "granted," by saying "or reserved from entry or location."

The PRESIDING OFFICER. That amendment is not at this moment in order unless the Senator from Oregon modifies his amendment so as to accept it.

Mr. DAWES. What has the Senator in mind?

Mr. REAGAN. I understand that is a general provision to take up lands anywhere.

Mr. DAWES. This bill puts in the public domain a large tract of land and provides in very minute particulars how it can be taken by settlers. Perhaps if the Senator would read the whole of it he would be satisfied.

Mr. REAGAN. Does it not include the country at large?

Mr. DAWES. No.

Mr. REAGAN. What particular part of the country does it relate to?

Mr. DAWES. The Coeur d'Alène reservation.

Mr. REAGAN. If it only applies to that I do not know that I care to press the amendment.

The PRESIDING OFFICER. The question is on the amendment of the Senator from Oregon [Mr. MITCHELL] to the amendment of the committee.

The amendment to the amendment was agreed to.

Mr. MITCHELL. I offer the amendment which I send to the desk to come in after the words "town sites," in line 6 of section 4.

The PRESIDING OFFICER. The amendment will be stated.

The CHIEF CLERK. In section 4, line 6, after the words "town sites," insert "or to locators and purchasers under the mineral laws of the United States;" so as to read:

> And shall be disposed of by the United States to actual settlers only, under the provisions of the homestead law and under the law relative to town sites, or to locators and purchasers under the mineral laws of the United States.

Mr. MITCHELL. The object of that amendment is simply to enable parties to take up the lands that have been thrown open by this treaty, under the mineral law.

The amendment to the amendment was agreed to.

Mr. MITCHELL. I offer the following amendment to come in after the word "settler," in line 7 of section 4: to insert the words "or purchaser," simply to make the section conform to what has been already agreed to.

The amendment to the amendment was agreed to.

Mr. MITCHELL. Now, in line 12 of section 4. I move to strike out the words "homestead laws" and insert "law under which the same may be entered as aforesaid;" so as to read:

> And shall be entitled to a patent therefor, in accordance with said law under which the same may be entered as aforesaid, and after the full payment of said sums.

Mr. DAWES. Was the amendment suggested by the Senator from Texas [Mr. REAGAN] adopted?

The PRESIDING OFFICER. It was not in order.

Mr. REAGAN. Let me inquire is this land in the Territory of Idaho?

Mr. MITCHELL. It is in the Territory of Idaho, not in the arid, but in the mountain region, and passes under the name of mineral and timber land. There is no arid country.

Mr. REAGAN. I think I had better insist on the amendment which I proposed.

The PRESIDING OFFICER. As soon as the pending's amendment is disposed of the amendment of the Senator from Texas will be in order. The question is on the amendment of the Senator from Oregon to the amendment of the committee.

The amendment to the amendment was agreed to.

Mr. REAGAN. Now, I move, in line 2, after the word "granted," to insert the words "or reserved from entry or location."

Mr. DAWES. Let us see how it will read then.

Mr. REAGAN. The Secretary has the amendment.

Mr. COCKRELL. Let the line and place where it comes in be reported.

[Page 5770] The CHIEF CLERK. On page 18, section 4, line 2, after the word "granted," it is proposed to insert "or reserved from entry or location;" so as to read:

> That all lands so sold or leased to the United States as recited or described in both of said agreements, and not heretofore granted or reserved from entry or location, shall, on the

passage of this act, be restored to the public domain, etc.

Mr. DAWES. I do not see that that will do any harm, and for abundant caution it may be well enough to put it in, although I do not understand that this land is anywhere near those reservations.

The amendment to the amendment was agreed to.

The amendment as amended was agreed to.

The bill was reported to the Senate as amended, and the amendments were concurred in.

The bill was ordered to be engrossed for a third reading, read the third time, and passed.

* * *

EXHIBIT 2293

CONGRESSIONAL RECORD – HOUSE
[June 10, 1890]

AGREEMENT WITH COEUR D'ALENE INDIANS.

[page 5905] The SPEAKER laid before the House the bill (S. 2828) to ratify and confirm certain agreements with the Coeur d'Alene Indians in Idaho Territory, and to make the necessary appropriations for carrying the same into effect, and for other purposes therein named.

Mr. KERR, of Iowa. I make the point of order that this bill should go to the committee of the Whole.

The SPEAKER. That point can not be made until after the bill has been read.

Mr. PERKINS. I will say that a House bill similar in its provisions to this has been considered by the Committee on Indian Affairs, has been favorably reported, and is now upon the Calendar.

Mr. PEEL. Is this bill the same in substance as the House bill?

The SPEAKER. In all these matters the Chair must depend upon the information of members of the committees. When the Chair is thus informed that a House committee has acted favorably on a House bill similar in substance to a Senate bill on the Speaker's table, he can not question the statement. The Chair will inquire of the gentleman from Kansas [Mr. PERKINS] whether his committee has requested that this bill be brought up.

Mr. PERKINS. I am not quite sure that the committee has made any direction or order of that character. I

request that the bill remain on the table until the committee can act.

The SPEAKER. The gentleman requests that while awaiting action of the committee this bill remain on the table. Is there objection? The Chair hears none.

* * *

EXHIBIT 2294

IDAHO ADMISSION BILL

[26 Stat. L. 215, ch. 656.]

AN ACT

To Provide for the Admission of the State of Idaho into the Union

Art. XXI, § 19

* * *

PREAMBLE

Whereas, The people of the territory of Idaho did, on the 4th day of July, 1889, by a convention of delegates called and assembled for that purpose, form for themselves a constitution, which constitution was ratified and adopted by the people of said territory at an election held therefor on the first Tuesday in November, 1889, which constitution is republican in form, and is in conformity with the Constitution of the United States; and,

Whereas, said convention and the people of said territory have asked the admission of said territory into the Union of States on an equal footing with the original states in all respects whatever. Therefore,

§ 1. Idaho admitted to union – Constitution ratified. – The state of Idaho is hereby declared to be a state of the United States of America, and is hereby declared admitted into the union on an equal footing with the original states in all respects whatever; and that the constitution which the people of Idaho have formed for

themselves be, and the same is hereby, accepted, ratified, and confirmed.

* * *

CONSTITUTION OF THE STATE OF IDAHO

Approved July 3, 1890.

* * *

PREAMBLE

We, the people of the state of Idaho, grateful to Almighty God for our freedom, to secure its blessings and promote our common welfare do establish this Constitution.

* * *

[Art. XXI, § 19]

§ 19. Religious freedom guaranteed – Disclaimer of title to Indian lands. – It is ordained by the state of Idaho that perfect toleration of religious sentiment shall be secured, and no inhabitant of said state shall ever be molested in person or property on account of his or her mode of religious worship. And the people of the state of Idaho do agree and declare that we forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indians or Indian tribes; and until the title thereto shall have been extinguished by the United States, the same shall be subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; that the lands

belonging to citizens of the United States, residing without the said state of Idaho, shall never be taxed at a higher rate than the lands belonging to the residents thereof. That no taxes shall be imposed by the state on the lands or property therein belonging to, or which may hereafter be purchased by, the United States, or reserved for its use. And the debts and liabilities of this territory shall be assumed and paid by the state of Idaho. That this ordinance shall be irrevocable, without the consent of the United States and the people of the state of Idaho.

EXHIBIT 205

51st Congress 1st *Session.* HOUSE OF REPRESENTATIVES Report No. 2988.

RATIFICATION OF COEUR D'ALENE INDIAN TREATIES IN IDAHO.

August 19, 1890. – Committed to the Committee of the Whole House on the state of the Union and ordered to be printed.

Mr. WILSON, of Washington, from the Committee on Indian Affairs, submitted the following

REPORT:
[To accompany S. 2828.]

The Committee on Indian Affairs, to which was referred Senate bill no. 2828, "to ratify and confirm certain agreements with the Coeur d'Alene Indians in Idaho, and to make the necessary appropriations for carrying the same into effect, and for other purposes," have had the same under consideration and report as follows:

House bill No. 7703 is exactly the same as the Senate bill, and was fully considered by the committee and reported favorably to the House in Report No. 1109; to which reference is made. Your committee therefore favorably recommend the passage of this bill.

[Page 2] House Report No. 1109,
Fifty-first Congress, first session.

The Committee on Indian Affairs, to whom was referred the bill (H. R. 7703) "to ratify and confirm certain

agreements with the Coeur d'Alene Indians in Idaho Territory, and to make the necessary appropriations for carrying the same into effect, and for other purposes therein named," having had the same under consideration, report as follows:

Your committee recommend the passage of this bill, the object of which is to ratify and confirm two certain agreements heretofore made with the Coeur d'Alene Indians in Idaho Territory, to make the necessary appropriations for carrying the same into effect, and for other purposes therein named.

* * *

[Omitted text identical to text in Exhibit 206, Joint Appendix pages 263-358]

* * *

[Page 47] **EXHIBIT I.**

SPOKANE FALLS, WASH., *JANUARY* 10, 1886.

DEAR SIR: Several Spokane Indians came to see me yesterday, and they told me to write to you to help them to get a piece of land as their own reservation. Geary and Welsho Louis, both head chiefs, made speeches and spoke very forcibly to show their rights. Welsho Louis wants you to obtain for him the privilege to go to Washington with one or two of his men, so that he himself could tell to the President the miserable condition in which more than four hundred people of his tribe are since the coming of the whites into their territory.

The United States agents at Colville and several of the fathers have tried their best for several years to

persuade them to go into some reservation, but they stubbornly objected to this; they say they want to be a nation as God made them, and if they can not obtain that they prefer to die than to be subjected to any other Indian tribe.

Please let them hear from you as soon as you conveniently can.

They even object to go to Washington with any people of any other tribe. To hear them you would believe that their national pride is not less than that of the old Romans.

Very respectfully yours,

JOS. M. CATALDO, S. J.

Capt. JOHN MULLAN.

EXHIBIT 2314

THE
STATUTES AT LARGE
OF THE
UNITED STATES OF AMERICA,
FROM
DECEMBER, 1889, TO MARCH, 1891,
AND
RECENT TREATIES, CONVENTIONS, AND EXECUTIVE PROCLAMATIONS.

EDITED, PRINTED, AND PUBLISHED BY
AUTHORITY OF CONGRESS, UNDER THE
DIRECTION OF THE SECRETARY OF STATE.

VOL. XXVI.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1891.

* * *

March 3, 1891

CHAP. 543. – An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June thirtieth, eighteen hundred and ninety-two, and for other purposes.

* * *

SEC. 19. The following agreement entered into on the part of the United States by John V. Wright, Jared W. Daniels and Henry W. Andrews, Commissioners with the Coeur d'Alene Indians in Idaho Territory signed on the part of said Indians by Chief Andrew Seltice, and others which bears date March twenty-sixth, eighteen hundred

and eighty-seven, and now on file in the Interior Department, is hereby accepted, ratified, and confirmed and is in the following words, to-wit:

AGREEMENT WITH COEUR D'ALENE.

This agreement made pursuant to an item in the act of Congress entitled "An act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the year ending June thirtieth, eighteen hundred and eighty-seven, and for other purposes," approved May fifteenth, eighteen hundred and eighty-six, by John V. Wright, Jared W. Daniels, and Henry W. Andrews, duly appointed commissioners on the part of the United States and the Coeur d'Alene tribe of Indians now residing on the Coeur d'Alene Reservation, in the Territory of Idaho, by their chiefs, headmen, and other male adults, whose names are hereunto subscribed, they being duly authorized to act in the premises, witnesseth:

ARTICLE I.

Whereas said Coeur d'Alene Indians were formerly possessed of a large and valuable tract of land lying in the Territories of Washington, Idaho, and Montana, and whereas said Indians have never ceded the same to the United States, but the same, with the exception of the present Coeur d'Alene Reservation, is held by the United States and settlers and owners deriving title from the United States, and whereas said Indians have received no compensation for said land from the United States: Therefore,

ARTICLE 2.

For the consideration hereinafter stated the said Coeur d'Alene Indians hereby cede, grant, relinquish, and quitclaim to the United States all right, title, and claim which they now have, or ever had, to all lands in said Territories and elsewhere, except the portion of land within the boundaries of their present reservation in the Territory of Idaho, known as the Coeur d'Alene Reservation.

ARTICLE 3.

The said Coeur d'Alene Indians agree and consent that the Upper and Middle bands of Spokane Indians residing in and around Spokane Falls, in the Territory of Washington, may be removed to the Coeur d'Alene Reservation and settled thereon in permanent homes on the terms and conditions contained in an agreement made and entered into by and between John V. Wright, Jared W. Daniels, and Henry W. Andrews, commissioners on the part of the United States and said Spokane Indians, concluded on the fifteenth day of March, eighteen hundred and eighty-seven, at Spokane Falls, in the Territory of Washington.

ARTICLE 4.

And it is further agreed that the tribe or band of Indians known as Calespels, now residing in the Calespel Valley, Washington Territory, and any other bands of non-reservation Indians now belonging to the Colville Indian

Agency, may be removed to the Coeur d'Alene Reservation by the United States, on such terms as may be mutually agreed on by the United States and any such tribes or bands.

ARTICLE 5.

In consideration of the foregoing cession and agreements, it is agreed that the Coeur d'Alene Reservation shall be held forever as Indian land and as homes for the Coeur d'Alene Indians, now residing on said reservation, and the Spokane or other Indians who may be removed to said reservation under this agreement, and their posterity: and no part of said reservation shall ever be sold, occupied, open to white settlement, or otherwise disposed of without the consent of the Indians residing on said reservation.

ARTICLE 6.

And it is further agreed that the United States will expend for the benefit of said Coeur d'Alene Indians the sum of one hundred and fifty thousand dollars, to be expended under the direction of the Secretary of the Interior, as follows: For the first year, thirty thousand dollars, and for each succeeding year for fifteen years, eight thousand dollars. As soon as possible after the ratification of this agreement by Congress, there shall be erected on said reservation a saw and grist mill, to be operated by steam, and an engineer and miller employed, the expenses of building said mill and paying the engineer and miller to be paid out of the funds herein provided. The remaining portion of said thirty thousand

dollars, if any, and the other annual payments shall be expended in the purchase of such useful and necessary articles as shall best promote the progress, comfort, improvement, education, and civilization of said Coeur d'Alene Indians, parties hereto.

ARTICLE 7.

It is further agreed that if it shall appear to the satisfaction of the Secretary of the Interior that in any year in which payments are to be made as herein provided said Coeur d'Alene Indians are supplied with such useful and necessary articles and do not need the same, and that they will judiciously use the money, then said payment shall be made to them in cash.

ARTICLE 8.

It is further agreed that any money which shall not be used in the purchase of such necessary articles or paid over, as provided in article seven, shall be placed in the Treasury of the United States to the credit of the said Coeur d'Alene Indians, parties hereto, and expended for their benefit, or paid over to them, as provided in the foregoing articles.

ARTICLE 9.

It is further agreed that in the purchase for distribution of said articles for the benefit of said Indians the wishes of said Indians shall be consulted as to what useful articles they may need, or whether they need any

at all, and their wishes shall govern as far as it is just and proper.

ARTICLE 10.

It is further agreed that in the employment of engineers, millers, mechanics, and laborers of every kind, preference shall be given in all cases to Indians, parties hereto, qualified to perform the work and labor, and it shall be the duty of all millers, engineers, and mechanics to teach all Indians placed under their charge their trades and vocations.

ARTICLE 11.

It is further agreed that in addition to the amount heretofore provided for the benefit of said Coeur d'Alene Indians the United States, at its own expense, will furnish and employ for the benefit of said Indians on said reservation a competent physician, medicines, a blacksmith, and carpenter.

ARTICLE 12.

In order to protect the morals and property of the Indians, parties hereto, no female of the Coeur d'Alene tribe shall be allowed to marry any white man unless, before said marriage is solemnized, said white man shall give such evidence of his character for morality and industry as shall satisfy the agent in charge, the minister in charge, and the chief of the tribe that he is a fit person to reside among the Indians; and it is further agreed that Stephen E. Liberty, Joseph Peavy, Patrick Nixon, and

Julien Boutelier, white men who have married Indian women and with their families reside on the Coeur d'Alene Reservation, are permitted to remain thereon, they being subject, however, to all laws, rules, and regulations of the Commissioner of Indian Affairs applicable to Indian reservations.

ARTICLE 13.

It is further agreed and understood that in consideration of the amount expended in buildings and other improvements on said Coeur d'Alene Reservation for religious and educational purposes by the De Smet Mission, and valuable services in the education and moral training of children on said reservation, and in consideration that the Indians, parties hereto, have donated for said purposes one section of land on which is situated the boys' school, one section on which is situated the girl's school, and one section of timbered land for use of the schools, that said De Smet Mission and its successors may continue to hold and use said three sections of land and the buildings and improvements thereon so long as the same shall be used by said De Smet Mission and its successors for religious and educational purposes.

ARTICLE 14.

This agreement shall not be binding on either party until ratified by Congress.

In testimony whereof the said John V. Wright, Jared W. Daniels, and Henry W. Andrews, on the part of the United States, and the chiefs, headmen, and other adult

Indians, on the part of the Indians, parties hereto, have hereunto set their hands and affixed their seals.

Done at De Smet Mission on the Coeur d'Alene Reservation, in the Territory of Idaho, on this the twenty-sixth day of March, in the year of our Lord one thousand eight hundred and eighty-nine.

SEC. 20. that the following agreement entered into with the said Coeur d'Alene Indians by Benjamin Simpson, John H. Shupe, and Napoleon B. Humphrey, Commissioners on the part of the United States, signed by said Commissioners and by said Andrew Seltice, Chief, and others, on the part of said Indians, which agreement bears date September ninth, eighteen hundred and eighty-nine, and is now on file in the Interior Department, is hereby accepted, ratified, and confirmed, and is in the following words, to wit:

AGREEMENT

This agreement, made pursuant to an item of an Act of Congress, namely; Section 4 of the Indian appropriation act, approved March two, eighteen hundred and eighty-nine, (25 Stat., 1002), by Benjamin Simpson, John H. Shupe, and Napoleon B. Humphrey, duly appointed commissioners on the part of the United States, parties of the first part, and the Coeur d'Alene tribe of Indians, now residing on the Coeur d'Alene Reservation in the Territory of Idaho, by their chiefs, headmen, and other male adults whose names are hereunto subscribed, parties of the second part witnesseth:

ARTICLE 1.

For the consideration hereinafter named the said Coeur d'Alene Indians hereby cede, grant, relinquish, and quitclaim to the United States, all the right, title, and claim which they now have, or ever had, to the following-described portion of their reservation, to wit: Beginning at the northeast corner of the said reservation, thence running along the north boundary line north sixty-seven degrees twenty-nine minutes west to the head of the Spokane River; thence down the Spokane River to the northwest boundary corner of the said reservation; thence south along the Washington Territory line twelve miles; thence due east to the west shore of the Coeur d'Alene Lake; thence southerly along the west shore of said lake to a point due west of the mouth of the Coeur d'Alene River where it empties into the said lake; thence in a due east line until it intersects with the eastern boundary line of the said reservation; thence northerly along the said east boundary line to the place of beginning.

ARTICLE 2.

And it is further agreed, in consideration of the above, that the United States will pay to the said Coeur d'Alene tribe of Indians the sum of five-hundred thousand dollars, the same to be paid to the said Coeur d'Alene tribe of Indians upon the completion of all the provisions of this agreement.

ARTICLE 3.

It is further agreed that the payment of money aforesaid shall be made to the said tribe of Indians pro rata or share and share alike for each and every member of the said tribe as recognized by said tribe now living on said reservation.

ARTICLE 4.

It is further agreed and understood that this agreement shall not be binding on either party until the former agreement now existing between the United States by the duly-appointed commissioners and the said Coeur d'Alene tribe of Indians, bearing date March twenty-sixth, eighteen hundred and eighty-seven, shall be duly ratified by Congress; and in the event of the ratification of the aforesaid agreement of March twenty-sixth, eighteen hundred and eighty-seven, then this agreement to be and remain in full force and effect but not binding on either party until ratified by Congress. In witness whereof the said Benjamin Simpson, John H. Shupe, and Napoleon B. Humphrey, on the part of the United States, and the chiefs, headmen, and other adult male Indians, on the part of the Indians, parties hereto, have hereunto set their hands and affixed their seals.

Done at De Smet Mission, on the Coeur D'Alene Reservation, in the Territory of Idaho, this the 9th day of September, in the year of our Lord one thousand eight hundred and eighty-nine.

SEC. 21. That for the purpose of carrying into effect the provisions of said two agreements with said Coeur

d'Alene Indians there are hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, in the manner and for the purpose as hereinafter specifically stated the following sums, to wit: For the first installment of one hundred and fifty thousand dollars, as provided for in article six of the first of said agreements, thirty thousand dollars, to be expended for the building and erection on said Coeur d'Alene Indian reservation of a saw and grist mill, to be operated by steam, and for the payment of the wages of the engineer and miller to be employed in said mill, respectively, the remaining portion of said thirty thousand dollars, if any, to be expended in the purchase of such useful and necessary articles as shall best promote the progress, comfort, improvement, education, and civilization of said Coeur d'Alene Indians, all of said articles to be purchased, and said engineer and miller to be employed as near as may be in strict conformity with articles nine and ten of the first of said agreements. And for the purpose of meeting the requirements of articles two and three of the second agreement aforesaid the sum of five hundred thousand dollars is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, to be paid by the United States to the said Coeur d'Alene tribe of Indians upon their compliance with all the provisions of the said second agreement hereinbefore recited, the same to be paid to the said tribe of Indians pro rata, or share and share alike, for each and every member of the said tribe as recognized by said tribe now living on said reservation.

SECTION 22. That all lands so sold and released to the United States, as recited or described in both of said agreements, and not heretofore granted or reserved from

entry or location, shall, on the passage of this act, be restored to the public domain, and shall be disposed of by the United States to actual settlers only, under the provisions of the homestead law, except section twenty-three hundred and one of the Revised Statutes of the United States, which shall not apply, and under the law relative to town sites or to locators or purchasers under the mineral laws of the United States: *Provided*, That each settler or purchaser under and in accordance with the provisions of said homestead act, shall pay to the United States, for the land so taken by him, in addition to the fees provided by law, and within five years from the date of the first original entry, the sum of one dollar and fifty cents per acre, one-half of which shall be paid within two years; but the rights of honorably discharged Union soldiers and sailors, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes of the United States shall not be abridged, except as to the said sum to be paid as aforesaid: *Provided further*, That the Secretary of the Interior shall cause to be surveyed for and patented to Frederick Post, upon his making final proof of all thereof before the register and receiver of the proper United States Land office, and to the satisfaction of the Commissioner of the General Land Office and Secretary of the Interior, and paying therefore two dollars and fifty cents per acre and the cost of making such survey of such portion of said reservation as is recited in the agreement in word and figures as follows, to wit:

"Know all men by these presents that I, Andrew Seltice chief of the Coeur d'Alene Indians, did on the first day of June, A. D. eighteen hundred and seventy-one,

with the consent of my people, when the country on both sides of the Spokane River belonged to me and my people, for a valuable consideration sell to Frederick Post the place now known as Post Falls, in Kootenai County, Idaho, to improve and use the same (water-power); said sale included all three of the river channels and islands, with enough land on the north and south shores for water-power and improvements; and have always protected the said Frederick Post, for eighteen years, in the rights there and then conveyed, and he has always done right with me and my people. We, the chiefs of the Coeur d'Alenes, have signed articles of agreement with the Government to sell the portion of the reservation joining Post Falls, in which we have excepted the above-prescribed rights, before conveyed to Frederick Post, and no Indian and no white man except Frederick Post have any rights on the above-described lands and river channels; the said Frederick Post has fulfilled all of his agreements with me and my people by improving the water-power and building mills at great expense, and I hereby authorize him to build a house and take full possession of the above-described lands on the reservation side, so that when the treaty is confirmed he may have full possession and protection of the Government in the same.

"Given under my hand and seal this 16th day of Sept'r., A. D. 1889.

his
"ANDREW x SELTICE.
mark.

* * *

EXHIBIT 207

HOUSE OF REPRESENTATIVES.

53D CONGRESS, 2d Session.) (Ex. Doc. No. 158.

AGREEMENT WITH COEUR D'ALENE INDIANS.

LETTER

FROM

THE SECRETARY OF THE INTERIOR,

TRANSMITTING

An agreement with the Coeur d'Alene Indians in Idaho, for a change of the northern boundary line of their reservation.

MARCH 23, 1894. – Referred to the Committee on Indian Affairs and ordered to be printed.

DEPARTMENT OF THE INTERIOR.
WASHINGTON, MARCH 22, 1894.

SIR: I have the honor to transmit herewith an agreement with the Coeur d'Alene Indians in Idaho for a change in the northern boundary line of their reservation so as to exclude therefrom a strip of land on which the town of Harrison and numerous settlers are located.

This agreement was negotiated in pursuance of a clause contained in the Indian appropriation act for the fiscal year 1894 (27 Stats., 616). It has been considered by the Commissioner of Indian Affairs and the Commissioner of the General Land Office, as shown by the

reports herewith, dated 27th ultimo and 14th instant, respectively.

I also transmit herewith a draft of a bill to ratify the agreement, with request that the same may receive the favorable action of Congress.

Very respectfully,

HOKE SMITH,
Secretary.

THE SPEAKER OF THE HOUSE OF REPRESENTATIVES.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, February 27, 1894.

SIR: Referring to the correspondence relative to negotiating with the Coeur d'Alene Indians of Idaho for a change in the northern boundary line of their reservation, so as to exclude therefrom a strip of land on which the town of Harrison and numerous settlers are located, in

* * *

The cession contemplated by said item having failed for the reasons above stated, another item looking to the accomplishment of the same object was inserted in the act making appropriations for current and contingent expenses and fulfilling treaty stipulations with Indian tribes, for fiscal year ending June 30, 1894 (27 Stats., 016). Said item is as follows:

The Secretary of the Interior is hereby directed to negotiate with the Coeur d'Alene Indians for a change of the northern line of their reservation, so as to exclude

therefrom a strip of land on which the town of Harrison and numerous settlers are located.

That the foregoing provision shall take effect and be in force after it shall have been submitted to and duly agreed to by the Indians of said tribe and approved by the Secretary of the Interior.

Agreement concluded on the 7th day of February, 1894, between John Lane, special U.S. Indian agent, on the part of the United States, and the Indians of the Coeur d'Alene Reservation in the State of Idaho.

ARTICLE I.

This agreement made on the 7th day of February, 1894, by John Lane, U.S. special Indian agent, on the part of the United States, and the Coeur d'Alene Indian, residing on the Coeur d'Alene Reservation, in the State of Idaho, by their chiefs, headmen, and principal men, embracing a majority of all the male adult Indians occupying said reservation, pursuant to an item in the act of Congress, making appropriations for current and contingent expenses, and fulfilling treaty stipulations with Indian tribes for the fiscal year ending June 30, 1894, as follows:

"The Secretary of the Interior is hereby directed to negotiate with the Coeur d'Alene Indians for a change of the northern line of their reservation so as to exclude therefrom a strip of land on which the town of Harrison and numerous settlers are located.

"That the foregoing provision shall take effect and be in force, after it shall have been submitted to and agreed to by the Indians of said tribe, and approved by the Secretary of the Interior."

Witnesseth, that the said Indians, for the consideration hereinafter named, do hereby cede, grant, and relinquish to the United States all right, title, and claim which they now have or ever had of, in, and to all the land embraced within the following-described tract, now a part of their reservation, to wit:

Beginning at a point on the north line of the reservation, on the east bank of the mouth of the Coeur d'Alene River, and running due south one mile, thence due east parallel with the north boundary line to the east boundary line, thence north on the east boundary line to the northeast corner of the reservation, thence west on the north boundary line to the point of beginning.

ARTICLE II.

And it is further agreed, in consideration of the above, that the United States will pay to the said Coeur d'Alene tribe of Indians the sum of fifteen thousand ($15,000) dollars, the same to be paid to the said Indians upon the completion of all the provisions of this agreement.

ARTICLE III.

It is further agreed that the payment of the money aforesaid shall be made to the said tribe of Indians pro rata, or share and share alike, for each and every member

of the said tribe as recognized by said tribe now living on said reservation.

ARTICLE IV.

The new boundary lines of the reservation, established by this agreement, or such portions thereof as are not defined by natural objects, shall be surveyed and marked in a plain and substantial manner. The cost of such surveys are to be paid by the United States.

ARTICLE V.

This agreement shall not be binding upon either party until ratified by Congress. Dated and signed at De Smet Mission, Idaho, this 7th day of February, 1894.

JOHN LANE,
U. S. Special Indian Agent.

Witness:
GEO. F. STEELE

The foregoing articles of agreement, having been fully explained to us in open council, we, the undersigned, chiefs, headmen, and principal men of the Coeur d'Alene tribe of Indians residing on the Coeur d'Alene Reservation, State of Idaho, do hereby consent and agree to all the stipulations therein contained.

Witness our hands and seals at De Smet Mission, State of Idaho, this 7th day of February, 1894.

1. Andrew Seltice, his x mark, seal.
2. Pierre Wild Shue, his x mark, seal.
3. Pierre Mac tal me, his x mark, seal.

Head chiefs of the
Coeur d'Alene Indians.

4. Arasis So so lum so, his x mark, seal.
5. Bonamachy Kon qul macy, his x mark, seal.
6. Bassa Silla, his x mark, seal.
7. Ad da wa, his x mark, seal.
8. Sap pler, his x mark, seal.
9. Camille Tim sin co, his x mark, seal.
10. Now el, his x mark, seal.
11. Louie Ans kou, his x mark, seal.
12. Ar ra pa, his x mark, seal.
13. Neoe kon ta, his x mark, seal.
14. Ben Kol le ra, his x mark, seal.
15. Andrew Mal mal la ca, his x mark, seal.
16. A chau, his x mark, seal.
17. Pi o uso, his x mark, seal.
18. Louie Antelope, his x mark, seal.
19. Basil, his x mark, seal.
20. Ko nel use, his x mark, seal.
21. Neos Che as so, his x mark, seal.

22. Arriarions, his x mark, seal.
23. Andrew Diat so ka, his x mark, seal.
24. Paul A chin na, his x mark, seal.
25. Daniel, his x mark, seal.
26. Sebastian Col la quin, his x mark, seal.
27. Peal, his x mark, seal.
28. Louie Mechell, his x mark, seal.
29. Pierre Joseph La ya isb, his x mark, seal.
30. Paul, his x mark, seal.
31. Lo Lo A whopt, his x mark, seal.
32. Stanislaus, his x mark, seal.
33. Moses lli a man, his x mark, seal.
34. Lonie Michataw, his x mark, seal.
35. Andrew Timothy, seal.
36. Joseph Whis ta kon, his x mark, seal.
37. Lonie Koe qum ta, his x mark, seal.
38. Leo rico ten sh ta, his x mark, seal.
39. Pierra Basa, his x mark, seal.
40. Phillip, his x mark, seal.
41. So set Ar I men saw, his x mark, seal.
42. A pel Kwa wild shoe, his x mark, seal.
43. Louis Neas, seal.
44. Samuel, his x mark, seal.
45. Nicodemns Cor o toe, his x mark, seal.

46. Bedell To mom or kin, his x mark, seal.
47. Louie Mul kap see, his x mark, seal.
48. Camille, his x mark, seal.
49. Augustine Chil chil ta, his x mark, seal.
50. Thomas Kioo, will aka, his x mark, seal.
51. Japarie Tal ya ya, his x mark, seal.
52. Basil Qua qua soo, his x mark, seal.
53. Alex son, his x mark, seal.
54. Francis She to la, his x mark, seal.
55. Sol Louie, his x mark, seal.
56. Seymour, his x mark, seal.
57. Neon Took la, his x mark, seal.
58. Prosper Tim el po, his x mark, seal.
59. Theodore Zoal mo schn ke, his x mark, seal.
60. Pierre Joseph Kkiki, his x mark, seal.
61. Al lech chco chin takin, his x mark, seal.
62. Sa cro Ta chim na, his x mark, seal.
63. Louis Bis cha, his x mark, seal.
64. A chan Sol lo to ca, his x mark, seal.
65. Pierre Kol kol lu ie, his x mark, seal.
66. Thomas, his x mark, seal.
67. Isadore, his x mark, seal.
68. Pat Davenport, his x mark, seal.
69. Neon Paul, his x mark, seal.

70. Adrian, his x mark, seal.
71. Lonie Cho ta wa, his x mark, seal.
72. Joseph Spol quil quo, his x mark, seal.
73. Na chan, his x mark, seal.
74. Neos, his x mark, seal.
75. Mas colla Chis ches ta, his x mark, seal.
76. Andrew Yonmas, his x mark, seal.
77. Abraham W [illegible], his x mark, seal.
78. Leo So wo Kon ta, his x mark, seal.
79. Abraham So o qua kim, his x mark, seal.
80. Joseph Ko lum quhway, his x mark, seal.
81. Benjamin Chil spo, his x mark, seal.
82. Lonio Sam, his x mark, seal.
83. Joseph Leo chum smee, his x mark, seal.
84. Luke Talo mn kum, his x mark, seal.
85. Phillip Weleho, seal.
86. Louie Seo oc com mens, his x mark, seal.
87. Paul Polotkan, seal.
88. Leo Ho ho o lo, his x mark, seal.
89. Leo Go Ka sah, his x mark, seal.
90. Bernard Spa cum sco, his x mark, seal.
91. Basil Clo chim mo, his x mark, seal.
92. Pierre New wok en, his x mark, seal.
93. Baren Jo shin neo, his x mark (old chief), seal.

94. Dn Bos Se la, his x mark, seal.

95. Andrew Al lo quit so, his x mark, seal.

96. Camillo Chn mo tnl ha, his x mark, seal.

97. Louis Pierre, seal.

98. Louis Lee, seal.

99. Louie Toto, his x mark, seal.

100. Phillip Stellam, seal.

101. Colshan, his x mark, seal.

102. Patrick Nixon, seal.

103. S. E. Liberty, seal.

104. Joseph Peavy, seal.

105. Moise I. Kaynsank, his x mark, seal.

106. Sehlateen, his x mark, seal.

107. Leon, his x mark, seal.

108. Louis Pein, his x mark, seal.

109. William Mason, his x mark, seal.

110. James Finley, his x mark, seal.

111. Nel cool lim tn, his x mark, seal.

112. Charles Du prey, his x mark, seal.

Witnesses,
GEO. F. STEELE.
THOMAS B. WARD.

I hereby certify that the foregoing articles of agreement were carefully read and explained to the Indians, parties hereto in open council, and were thoroughly

understood by them before signing the same, and that the agreement was executed and signed by said Indians at the De Smet Mission in Idaho, on the 7th day of February, 1894.

PAUL POLOTKAN,
Interpreter.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D.C., March 14, 1894.

SIR: I have the honor to acknowledge the receipt, by departmental reference, of a letter from the Commissioner of Indian Affairs, dated February 24, 1894, accompanied by an incomplete bill ratifying an agreement negotiated with the Coeur d'Alene Indians, dated February 7, 1894, ceding to the United States a strip of land along the north boundary of their reservation. – I am directed to complete the bill (i.e.), provide for the *survey* and *disposal* of the ceded lands.

In compliance with your directions I have added sections 3, 4, and 5, and a complete copy of the bill is herewith submitted; and your attention is respectfully directed to the following points for consideration:

The reading of the agreement provided by the Commissioner of Indian Affairs has been retained, and is incorporated in the bill. The last clause of article 1 of the agreement (p. 2) reads "thence north on the east boundary line"; the east boundary (see attached diagram) does not run *north*, its bearing is N. 33° 23' E.; consequently the description would agree more closely with the facts if the words "north on" could be replaced by "along," thus

making the above-quoted phrase read, "thence along the east boundary line," etc. Probably the suggested change could be made without involving legal complications.

Referring to pages 3 and 4 of the Commissioner's letter, this office finds no precedent for providing a town site "1 mile square," when that already laid out contains, according to the official plat forwarded by the surveyor-general, only 20 acres. I can not see how, with our limited knowledge of existing conditions, a definite value can be assigned to the town site in advance of survey and appraisement thereof.

After taking into consideration the equities of the case, I have concluded to provide for the appointment of a board of appraisement, as set forth in the bill, as the best way to secure justice to bona fide residents of Harrison and other settlers, and to provide for reimbursement to the United States of the $15,000 paid for the ceded tract.

In the bill the amount of appropriation for survey and appraisement is left blank. The *survey* alone will cost $745; the appraisement, $150, allowing five days for the work after the board assembles on the ground; total, $895, which will be increased by traveling expenses of members of the board. As the latter item will depend in part on the distance from the reservation to the members' homes, I am unable to state the total amount of the appropriation required; but the item "traveling expenses" may be readily approximated and added to the above if, in advance of the ratification of the agreement, you can decide from what section of the country the members of the proposed board of appraisement will be appointed.

The papers referring to the case are herewith returned.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

The SECRETARY OF THE INTERIOR.

A bill to ratify and confirm an agreement with the Indians occupying the Coeur d'Alene Reservation, Idaho, and make provisions for carrying the same into effect.

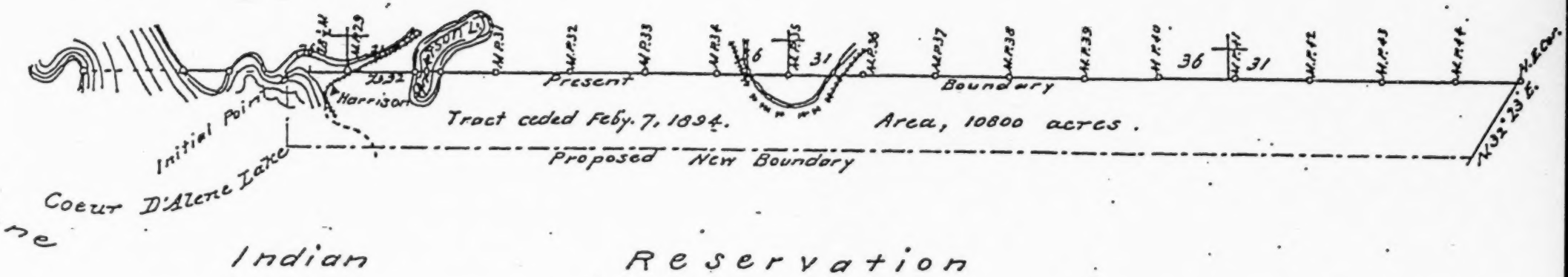
Whereas, John Lane, special United States Indian agent, duly designated by the Secretary of the Interior to *negotiate* with the Coeur d'Alene Indians for a change in the northern boundary line of their reservation so as to exclude therefrom a strip of land on which the town of Harrison and numerous settlers are located under and by virtue of a clause contained in the Indian appropriation act, approved March 3, 1803, did, on the seventh day of February, anno Domini, one thousand eight hundred and ninety-four, conclude an agreement with the various tribes or bands of Indians residing upon the Coeur d'Alene Reservation in the State of Idaho, by their chiefs, headmen, and principal men, embracing a majority of all the male adult Indians occupying said reservation, which agreement is as follows:

Agreement concluded on the 7th day of February, 1894, by John Lane, United States Special Indian agent, on the part of the United States, and the Indians of the Coeur d'Alene Reservation in the State of Idaho.

ARTICLE I

This agreement made on the 7th day of February, 1894, by John Lane, United States special Indian agent, on the part of the United States, and the Coeur d'Alene Indians, residing on the Coeur d'Alene Reservation in the State of Idaho, by their chiefs, headmen, and principal men, embracing a majority of all the male adult

* * *



Coeur D'Alene Indian Reservation

H Ex 158 53 2

EXHIBIT 838

United States Patent,
United States of America,
To
Frederick Post,

State of Idaho)
) ss.
County of Kootenai)

Filed for record at the request of Frederick Post, on the 22th day of September 1894, at 9^{35} o'clock A.M. and recorded in Book L. of Deeds on page 623.

Robt. S. Bragaw
County Recorder

Fee 3^{00}

The United States of America. To all to whoom [sic] these presents shall come, Greeting.

Whereas, it appears by an act of Congress approved March three, A.D. one thousand eight hundred and ninety one entitled An Act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations, with various Indian Tribes, for the year ending June thirtieth, eighteen hundred and ninety two, and for other purposes, that an agreement was made between certain commissioners on the part of the United States and Coeur d'Alene tribe of Indians residing on the Coeur d'Alene Reservation in the then Territory of Idaho; And Whereas, by a proviso to section twenty two, of article four of said agreement. (Statutes at large, Vol. 26 page 1031) provisions is made by the acts aforesaid, for the patenting of a certain tract of

land to Frederick Post, in the terms following, to-wit: That the secretary of the Interior shall cause to be surveyed for and patented to Frederick Post, upon his making final proof of all thereof before the register and receiver of the proper United States land office, and to the satisfaction of the Commissioners of the General Land Office and Secretary of the Interior, and paying therefor two dollars and fifty cents per acre and the cost of making such survey of such portions of said reservation as is recited in the agreement in words and figures as follows, to wit: Know all men by these presents that I Andrew Seltice, Chief of the Coeur d'Alene Indians, did on the first day of June, A.D. eighteen hundred and seventy one, with the consent of my people, when the Country on both sides of the Spokane River belonged to me and my people, for a valuable consideration sell to Frederick Post, the place now known as Post Falls, in Kootenai County, Idaho, to improve and use the same (water power) said sale included all three of the River Channels and Islands with enough land on the north and south shores for water power and improvements; and have always protected the said Frederick Post for Eighteen years, in the rights then and there conveyed and he has always done right with me and my people: We the Chiefs of the Coeur d'Alene have signed articles of agreement with the Government to sell the portion of the Reservation joining Post Falls, in which we have excepted the above prescribed rights before conveyed to Frederick Post and no Indian and no White Man except Frederick Post has any rights on the above described lands and River Channels; the said Frederick Post has fulfilled all of his agreements with me

and my people by improving the Water Power and building Mills at great expense and I hereby authorize him to build a house and take full possession of the above described lands on the Reservation side so that when the treaty is confirmed he may have full possession and protection of the Government in the same. Given under my hand and seal this 16th day of Sept. A.D. 1889.

his
"Andrew X Seltice"
mark.

And Whereas; there has been filed in the General Lands Office of the United States, a plat of Survey of the confirmed Claim of Frederick Post duly executed and approved as appears by the certificate dated September five, Eighteen hundred and ninety three, over the signature of Joseph Straughan, U.S. Surveyor General for the State of Idaho which map of survey and certificate an hereunto attached and made a part of these presents.

And Whereas, it further appears by the files and records of the General Land Office, that the lands embraced in said survey amounting to two hundred and ninety eight acres and nine hundred and ninety four thousandths of an acre have been paid for and that the United States has been reimbursed the costs of surveying said claims as proscribed in the Act aforesaid and as above set forth; which said purchase money and costs of survey amounting to the sum of eight hundred and forty seven dollars and ninety eight cents have been covered into the Treasury of the United States.

Know Ye, That the United States of America in consideration of the promises and pursuant to the provisions of the Act of Congress aforsaid, Has given and Granted and by these presents [illegible] give, and grant the said Frederick Post his heirs and assigns the lands embraced and described in the foregoing survey.

To Have and To Hold the said tract or parcel of land with the appurtenances thereunto appertaining unto the said Frederick Post, his heirs and assigns forever. In Testimony whereof I Grover Cleveland, President of the United States of America have caused these letters to be made Patent and the seal of the General Land Office to be hereunto affixed.

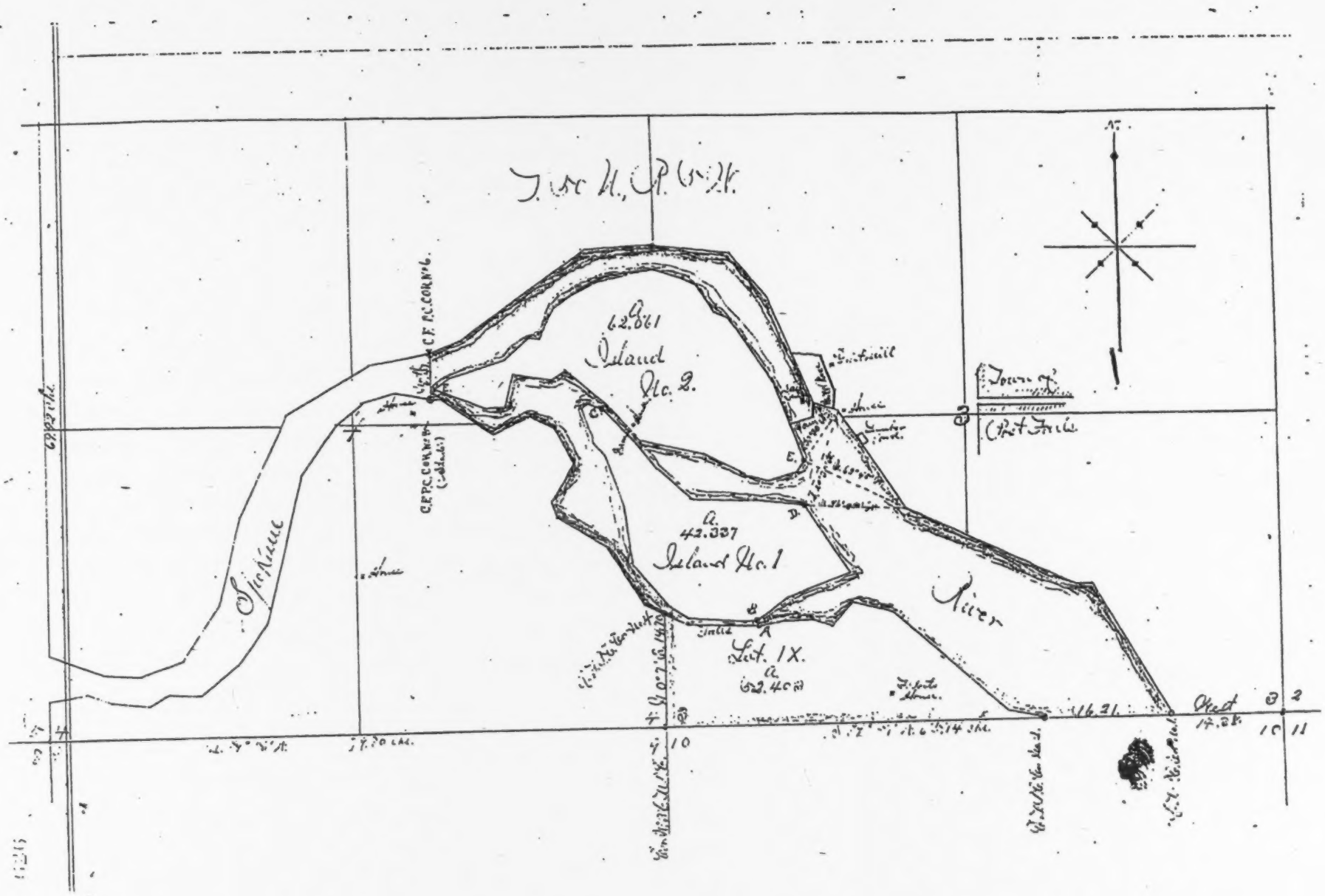
Given under my name at the City of Washington the fifth day of September in the year of One Thousand Eight hundred and ninety four, and of the Independence of the United States the one hundred and nineteenth.

By the President Grover Cleveland

[seal]

By E. Macfarland, Asst Secretary
L.D.C. Lamar
Recorder of the General Land Office

Recorded in Vol. 20 p. 433-436.


T. & H. G.P.O.N.
62.681
Island No. 2.
42.337
Island No. 1
Lot. IX.
62.408
C.P.R. Co's No. 6.
C.P.R. Co's No. 5.
(Cable)
Spa Creek
River
Road
Town of
(Ref. Fwd)
N.
116.31
17.28
10
11
2
3
4
5
6
7
8
9

Reserved for map

Plat of the
Confirmed Claim of Frederick Post in
T. 50 N., R. 5 W., Boise Idaho
Scale: 10 Chains = 1 inch
Surveyed November 10-12th 1891, and
July 1st 1893
By W. Clayton Miller U.S. Dep. Serv.

Area of Land surface 156.801 Acres
" " Water " 141.593
Total Area of Claim 298.394 Acres

The above Plat of the "Confirmed Claim of Frederick Post" Township No. 50 North, Range No. 5 West of the Boise Meridian as surveyed by W. Clayton Miller, U.S. Deputy Surveyor under separate special instructions, included in his Contract No. 1889 dated June 19th 1891, and in pursuance of directions contained in letter, [illegible] of the Commissioner of the General Land Office dated May 29th 1893, is strictly conformable to the field notes of the Survey thereof, on file in this office which has been examined and approved.

Joseph C. Straughan
U.S. Surveys County of Idaho

U.S. Surveyor General Office
(Boise City, Idaho, September 6th 1893.

EXHIBIT 1439

A History of the Coeur d'Alene Tribe's Claim to Lake Coeur D'Alene

by

E. Richard Hart
Institute of the NorthAmerican West

[EXCERPTS]

Expert Testimony Submitted to the
United States Department of Justice
United States v. Idaho
July 15, 1996

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A History of the Coeur d'Alene Tribe's Claim to Lake Coeur d'Alene, 1780-1872

[Omitted]

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United States Conveyance of Lakes and Rivers to the Coeur d'Alene Tribe and Subsequent Tribal Cessions,

1873-1911 -

[EXCERPTS]

VII The 1873 Agreement and Executive Order, 1873-1876

Great changes were taking place in federal Indian administration in the early 1870s. Not only was Congress determined to establish a new direction in the area of policy, the organization of the Indian Bureau was being revised. With the completion of the transcontinental railroad in 1869, settlement of what had been remote portions of the West now seemed imminent, and Congress determined that it was time to bring an end to treaty-making. The Indian Appropriations Act of March 3, 1871 contained a provision stating that "hereafter no Indian nation or tribe within the territory of the United States may contract by treaty." It was still possible to make agreements with tribes, subject to approval by the Senate

and House, but Commissioner Edward P. Smith said even agreements should be ended:[184]

> We have in theory over sixty-five independent nations within our borders, with whom we have entered into treaty relations as being sovereign peoples; and at the same time the white agent is sent to control and supervise these foreign powers, and care for them as wards of the Government. This double condition of sovereignty and wardship involves increasing difficulties and absurdities, as the traditional chieftain, losing his hold upon his tribe, ceases to be distinguished for anything except for the lion's share of goods and moneys which the Government endeavors to send, through him to his nominal subjects, and as the necessities of the Indians, pressed on every side by civilization, require more help and greater discrimination in the manner of distributing the tribal funds. So far, and as rapidly as possible, all recognition of Indians in any other relation than strictly as subjects of the Government should cease.

The federal government also limited state influence on Indian matters, and solidified its central authority. In 1870 the Idaho Superintendency was abolished and agents were told to report directly to Washington, D. C. The same was done for the Washington Superintendency in 1874. In the early 1870s it was not always clear which superintendency or agency had responsibility over the

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[184] Tyler, S. Lyman. *A History of Indian Policy.* Washington, D. C.: United States Department of the Interior, 1973, pp. 84-85 and 91. [182]

Josephy, Alvin M., Jr. *The Indian Heritage of America.* New York: Alfred A. Knopf, 1974, p. 339. [96]

Coeur d'Alenes.[185] Agents for the Nez Perce were sometimes called upon to deal with Coeur d'Alene, as were agents from the newly established special agency at Colville.

In 1872 pressures mounted to either force the Coeur d'Alenes to move onto the already set aside 1867 reservation, or to negotiate in good faith with the United States, not only to establish a new, acceptable reservation, but to arrange a cession of the tribe's aboriginal holdings. The Commissioner of Indian Affairs reported that the Coeur d'Alene had refused to locate on the lands set aside in the 1867 Executive Order, and thus "continued to roam over the tract of country claimed by them."[186] The remote tribe was relatively small in numbers, perhaps totalling 500, had little experience dealing with outsiders, and was confronted with what must have been a daunting political state of affairs. Nevertheless, Coeur d'Alene tribal leaders also responded to the pressure. Having finally become aware of the inadequate reservation that had been set aside for them, the Chiefs of the tribe petitioned the Commissioner of Indian Affairs in 1872 to create a new reservation, one that included their important waterways. Their first petition, which apparently has not survived, was submitted in October, 1872, probably to the

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[185] Hill, Edward E. *Guide to Records in the National Archives of the United States Relating to American Indians.* Washington, D. C.: National Archives and Records Service, General Services Administration, 1981, pp. 135 and 146. [85]

[186] United States. Department of the Interior. Commissioners of Indian Affairs. "Annual Report for 1873," Washington, D. C.: Government Printing Office, pp. 385 and 392. [234]

Nez Perce Agent, John A. Simms. One month later nine Coeur d'Alene leaders, headed by Andrew Seltice, sent a petition to the Commissioner of Indian Affairs, requesting additional lands.[187]

The Chiefs of Coeur d'Alene said that they wanted an adequate portion of land set aside for them. They said they had assumed that any reservation for the Coeur d'Alene would, as "a matter of course," include the mission and valleys of the St. Joe and Coeur d'Alene Rivers, but were now worried that they did not have these valleys. They said they had buried their parents, children, relations and friends at the mission, "and never for a moment could we have harbored the thought of abandoning it."

> As to the two valleys, we did not think to ask for them, though they have been from old the habitual residence of most of us; because being every spring under water, we thought no white man could ever settle there in fact there is none as yet; the few spots which usually escape being inundated, we have there farmed in and cultivated.

They went on to say, in their petition to the Commissioner, that the greatest part of the lands they requested was not suitable for farming, and that they could not yet sustain themselves on farming alone, and "for a while yet we must have some hunting and fishing." The Chiefs recalled the treaty signed between the tribe and Colonel

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[187] Chiefs of the Coeur d'Alene Nation to [Commissioner of Indian Affairs], November 18, 1872, Letters Received, Washington Superintendency, Microfilm, M 234, Roll 912, RG 75, National Archives. [300]

Wright, and said they still retained their copy. They reminded the United States that the tribe had promised to allow roads to be built through their territory, but that in return the United States had promised, "that the land should remain ours." The Chiefs pointed out that the tribe had kept their promises, had not molested either road builders or neighboring white settlers, and if the United States cared to test their assertion, "we confidently appeal to the testimony of the settlers on Pine Creek; let them say whether they found us good neighbors or not." They concluded by asking that Mr. Simms, Agent to the Nez Perce, "or another whom you might appoint would come and visit the land, see what we ask for, and what we have done already. Uncertainty tends to paralyze our people; when certain of a home they will work with new energy." Education was already an important issue for the Coeur d'Alenes (as it was important to the then current policy-makers in Washington), and they asked to have Catholic schools, with support from Washington.

> Therefore we hope you will grant us this bit of land, and we will feel thankful for it. We know you do help other Indians with tools, clothing and food; this is only one thing we might need. We want Brothers and Sisters to educate our children, perhaps we won't yet be able to maintain them, but about this we intended to write on another time, for all the balance we choose rather to depend on our own hands.

The petition was signed by nine Coeur d'Alene Chiefs and witnessed by three Catholic priests, including Joset and Cataldo.[188]

Agent Simms, who was suffering from ill health, contacted the Superintendent of the Washington Superintendency, providing him with information about the Coeur d'Alenes' desires for a treaty and reservation. General R. H. Milroy, the Superintendent, closely mirroring the beliefs of Commissioner Smith, strictly ordered Simms to abide by the language of the recent Appropriation Act. Milroy gave instructions for Simms in dealing with all of the tribes under his agency, including Coeur d'Alene. He said he had:[189]

> . . . no hope that the Govt. will grant any authority to make a treaty with your Indians, as the policy of the Govt. is decidedly against making any more treaties with Indians. I feel pretty sure that the last treaty by the United States with any Indian tribes within her limits has been made.

The superintendent said it was Simms' duty to make sure the Indians understand that they could only remain on their aboriginal lands subject to the terms he had already offered (that is solely as citizens of the United States, like other citizens). He compared small individual allotments,

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[188] Chiefs of the Coeur d'Alene Nation to [Commissioner of Indian Affairs], November 18, 1872, Letters Received, Washington Superintendency, Microfilm, M 234, Roll 912, RG 75, National Archives. [300]

[189] Superintendent of the Washington Superintendency, R.H. Milroy to John A. Simms, December 14, 1872, Letters Received, Washington Superintendency, Microfilm, M 234, Roll 912, RG 75, National Archives, emphasis in original. [301]

or homesteads, to small individual reservations. The government, he said, "offers to Every Indian a *reservation* in his individual right on the same terms that he offers & gives to all his white children who desire to accept them." Tribes with no treaties, such as the Coeur d'Alene have nothing to lose, he added, by "thus accepting individual reservations or claims except the empty & worthless right" of being regarded as a tribe rather than as "individual American citizens." Milroy said that,

> By renouncing this useless right they will not be required to separate . . . themselves away from each other. They can select lands in adjoining tracts and thus cover & hold all of their old homes and country that they desire.

He said that without a treaty, "*morally* and *socially* they can remain as Indian tribes but not *legally*." He concluded that, "they have everything to gain and nothing to lose by renouncing that worthless legal right," meaning that if they would renounce their tribal affiliation they could make homestead entries and be like all other American citizens.

> As it is the policy of the Govt. to encourage the Indians to become settled like white citizens and draw their subsistence from the soil as much as possible and to cease their dependence on wild game and fish . . .

Milroy also wrote to the Commissioner, enclosing copies of reports of Special Agent Simms, and reporting

on Indians in that jurisdiction commenting on the work of the Catholic Missions.[190]

> I am informed that the Catholic Fathers having one or more comfortable missions among the Catholic Indians East of the Columbia where they are surrounded by their converts are opposed to having them move on to the [Colville] reservation and have influenced Mr. Simms to their views and hence his request to have reservation boundaries changed.

He attached speeches of Indian Chiefs from Council held November 6, 1872, by Agent Simms. Spokane Garry spoke. The Coeur d'Alenes expressed their belief that they remained sovereign, and that absent any treaty, they still owned their aboriginal territory. Quin-a-mous-a, a Coeur d'Alene said:

> I am going to talk to you and the President. I am going [to] tell you about my lodge, all of the people the men, the women and the children and the children that are not yet born. This is what I am attending to and I want you to attend to them likewise. I want you to do right. What you are going to do. I want to live like the white man. We our people do not want the President to make laws for us. We have our own laws, they are good enough for us and we want to live by them. When my children talks to you about the reserve, I want you to listen to them what they ask.

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[190] Supt. of Indian Affairs, Washington Territory, to Commissioner of Indian Affairs, December 15, 1872, Letters Received, Washington Superintendency, Microfilm, M 234, Roll 912, RG 75, National Archives. [302]

Seltice of the Coeur d'Alene said:

> I did not intend saying anything to do, but I have heard something that now makes me speak. "Garry" [Spokane] says that he will not go over to the Okanagan. I am of the same mind. We have not sold our country and shall not leave it.

As more non-Indians moved closer and closer to the Coeur d'Alenes, pressures increased on territorial and federal officials to establish the tribe on a reservation. In 1873 officials were pressured to have the 1867 reservation surveyed so that the tribe could be removed there and the lands they were occupying could be opened to white use.[191] As a result, funds were allocated to survey the 1867 Coeur d'Alene Reservation. The Surveyor General recommended using any excess funds to subdivide the Coeur d'Alene Reservation. He said there was a great deal of excitement among the Indians as a result of the Modoc hostilities. Subdividing the Coeur d'Alene Reservation, he said, would help quiet their excitement.[192] Early in May, D. P. Thompson was appointed to carry out the survey. Thompson reported to the Surveyor General that he had spoken with Father Cataldo, whom he said he knew represented the views of the tribe. He said that the old mission site was on the St. Joe River, but the mission

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[191] Wheaton [?] to Hon. H. W. Corbett, January 23, 1873, Letters Received, Washington Superintendency, Microfilm, M 234, Roll 912, RG 75, National Archives. [303]

[192] Surveyor General of Idaho to Commissioner of General Land Office, April 29, 1873, Letters Received, Washington Superintendency, Microfilm, M 234, Roll 912, RG 75, National Archives. [304]

was now situated on the Coeur d'Alene River. He went on to report that the 1867 reservation was inadequate.[193]

> The section of country to be included is almost worthless as an agricultural country but will include the fisheries on the lake and the St. Joseph's River. To run to the old mission would not include the fisheries on either the lake or river. I think the matter should be arranged before the Reservation line is run. Should the fishing be excluded there will in my opinion be trouble with these Indians but should they be included and also the mission which should also be in the Reserve there will be no trouble.

He included a sketch (see Map 8) of what he (after talking with Cataldo) thought the reserve should include, although he had never been to the lake or the mission. He said no settlers were in the area that he proposed. Since the boundary line had not yet been run, there was time to arrange it, he said. His diagram was entitled, "diagram of Coeur d'Alene Reservation as the Indians wish it," and shows a line running from the mission to a point on Latah Creek 15 miles from the Idaho border, then west to the border, then north along the Idaho/Washington border until opposite the mission, and to the point of beginning, thus, with correctly drawn lines, taking in the southern two-thirds of the lake, all of Coeur d'Alene River from the Mission to the lake and a portion of the St. Joe

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[193] D. P. Thompson to Surveyor General, May 6, 1873, Letters Received, Washington Superintendency, Microfilm, M 234, Roll 912, RG 75, National Archives. [305]

River.[194] The Acting Commissioner of the General Land Office forwarded his letter to the Commissioner of Indian Affairs on May 31, 1873.[195]

In the meantime, the priests at Sacred Heart Mission had worked hard to exert influence in Washington. Without their efforts it is unlikely that a new agreement and reservation would have been established. The priests contacted the Catholic officials in Washington, D. C., and on June 5, Charles Ewing, Catholic Commissioner of Indian Missions, wrote to the Secretary of the Interior. Ewing's letter was strong, direct, and proved to be very influential. He said he had reliable reports that the Indians in the north of Washington Territory were converted to Catholicism, except the Spokanes.[196]

> The Coeur d'Alenes want to have a reservation set apart large enough for themselves & their Indian friends who wish to settle among them. They want to have it secured to them before the

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[194] D. P. Thompson to Surveyor General, May 6, 1873, Letters Received, Washington Superintendency, Microfilm, M 234, Roll 912, RG 75, National Archives. [305]

[195] Acting Commissioner of the General Land Office to Commissioner of Indian Affairs E. P. Smith, May 31, 1873, Letters Received, Washington Superintendency, Microfilm, M 234, Roll 912, RG 75, National Archives. [306]

[196] Catholic Commissioner of Indian Missions Charles Ewing to Secretary of the Interior, June 5, 1873, Letters Received, Washington Superintendency, Microfilm, M 234, Roll 912, RG 75, National Archives, provides quotation, with emphasis in original. [307]

Schoenberg, Wilfred P. A *History of the Catholic Church in the Pacific Northwest, 1743-1983.* Washington, D. C.: The Pastoral Press, 1987, p. 247. [158]

whites have possessed themselves of the choice portions of it. They have several times petitioned the Indian Bureau to that effect, & have designated the boundaries they desire. A reservation was set apart for them June 14, 1867, but has not been surveyed; & the Indians did not know that their reservation had been designated until some two years ago: they at once said it is not large enough.

The opinion of the Indians having been represented to the Department, it was ordered that the survey be postponed until the Indians could have an opportunity to make their wishes & reasons known in regard to it through the commissioner to be appointed by the Government. When they have the guarantee that their reservation, as they want it, is secured to them, they are disposed to relinquish all their lands without any charge, except that they will want schools and a saw and grist mills.

But the Indians say that this their settlement must be a permanent one, & for this reason they want to see a high officer, *direct* from their Great Father; the highest authority the Government can send; a man whose report will be respected at Washington, so that what he says will be law, permanent law, unchangeable law. He must be also a man whose honesty of purpose, personal integrity, friendship & devotedness to the Indians they can be sure of; so that they may have a *big talk* with him, fully speak their hearts to him, confident that whatever they say will be taken in good part & will be used for their greater good.

They want, they say, a big talk; they want to unburden their hearts from a heavy load of

> grievances, real or imaginary, which have been accumulating for many years. When this load is off their hearts, they have the positive assurance from the highest representative of the Government that they will never be disturbed on their reservation they will be the happiest and most devoted wards or citizens of this Republic.

Ewing went on to say much the same about the Spokane and the Colvilles. The Spokanes refused to go to the Colville Reservation, he reported, but "the larger portion of the them may be induced to go on the Coeur d'Alene Reservation." He added that the Coeur d'Alenes said they do not want to negotiate with Nez Perce Agent Monteith, because he was not a high enough official, nor was he their friend. Someone should be sent, Ewing implied, who was not opposed to the Catholic religion.

On June 30, the Secretary of the Interior told the Commissioner of Indian Affairs that an Inspector should be sent to Coeur d'Alene.[197] The following day the Commissioner took action, authorizing a commission to travel to Coeur d'Alene and meet with the tribe. A commission had earlier been appointed to deal with the Bannock Indians at Fort Hall. The Commission was comprised of J. P. C. Shanks, Governor T. W. Bennett of Idaho, and Special Agent Henry W. Reed. The Commissioner of Indian Affairs contacted Shanks and authorized his commission to "visit the Coeur d'Alene Indians, to hear complaints, with a view to their cure or removal, and to induce them

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[197] Acting Secretary of the Interior to Commissioner of Indian Affairs, June 30, 1873, Letters Received, Washington Superintendency, Microfilm, M 234, Roll 912, RG 75, National Archives. [308]

to abandon a roving life and consent to confine themselves to a reservation."[198] Bennett indicated in correspondence to the Commissioner that he thought the Coeur d'Alenes, who were having difficulties with the whites, should be removed to an already existing reservation and that troops should be used in the territory, if necessary, to see that Indians did not travel outside their reserves.[199]

Despite Ewing's admonition that Agent Monteith should not be involved in any negotiations, the party that met with the Coeur d'Alenes on July 29 on Latah or Hangman's Creek, included Monteith, along with Commissioners Shanks and Bennett. Ironically, it seems to have been Monteith, who was largely responsible for the agreement signed with the tribe. On August 1, Shanks wrote to the Secretary of the Interior, enclosing a copy of the agreement. In his cover letter he complained about

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[198] Smith to Shanks, July 1, 1873, Letters Sent by the Commissioner of Indian Affairs, RG 75, Microfilm, M21, Roll 112, RG 75, National Archives. [309]

United States. Department of the Interior. Commissioners of Indian Affairs. "Annual Report for 1873," Washington, D. C.: Government Printing Office, pp. 385 and 392. [234]

Bennett to Secretary of the Interior, April 10, 1873, Letters Received, Idaho Superintendency, Microfilm, M 234, Roll 341, RG 75, National Archives, had indicated he supported the idea of a commission, but did not want to be on it. [310]

[199] Bennett to Commissioner, May 21, 1873, Letters Received, Idaho Superintendency, Microfilm, M 234, Roll 341, RG 75, National Archives. [311]

Bennett to Commissioner, June 4, 1873, Letters Received, Idaho Superintendency, Microfilm, M 234, Roll 341, RG 75, National Archives. [312]

Ewing's letter to the Secretary, a copy of which he said had been circulating. He said the Indians were now expecting to receive favorable treatment as Catholics, which he evidently opposed, saying "the letter purporting to be from Charles Ewing does not do him & his people full justice." He asked the Secretary to suspend the survey of the reservation pending the commission's final report.[200] Five days later, the Commissioners also sent a telegram asking for the suspension of the survey, and suggesting their agreement would require a change in the reservation boundaries.[201] The General Land Office complied with these requests and suspended the survey of the 1867 Executive Order Reservation.[202]

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[200] Shanks to Sec. of the Interior, enclosing agreement with Coeur d'Alene, August 1, 1873, Letters Received, Idaho Superintendency, Microfilm, M 234, Roll 341, RG 75, National Archives. [313]

United States. Department of the Interior. Commissioners of Indian Affairs. "Annual Report for 1873," Washington, D. C.: Government Printing Office, pp. 385 and 392. [234]

Ewing to Secretary of the Interior, June 5, 1873, Letters Received, Washington Superintendency, Microfilm, M 234, Roll 912, RG 75, National Archives, also suggested the ongoing survey was counter-productive. [307]

[201] Shanks, Bennett and Monteith, Telegram, August 6, 1873, Letters Received, Washington Superintendency, Microfilm, M 234, Roll 912, RG 75, National Archives. [314]

[202] United States. Department of the Interior. General Land Office. "Report of the Commissioner of the General Land-Office to the Secretary of the Interior for the Year 1873," 1873. Washington, D. C.: Government Printing Office, pp. 141 and 144. [270]

The agreement that had been reached called for setting aside a reservation "for the exclusive use of the Coeur d'Alene Indians" that would enclose all of Lake Coeur d'Alene, the Catholic Mission and all of the Coeur d'Alene River from the mission to the lake, and a stretch of the St. Joe River from near the location of the first mission to where it entered the lake, along with "all and singular the lands and privileges lying" within the proposed boundaries. Under the proposed terms, the United States reserved the right to construct roads through the reserve, but promised "that the waters running into said Reservation shall not be turned from their natural channel where they enter said Reservation." The Tribe, in turn, agreed to relinquish all claims to the remainder of their aboriginal territory, provided that the United States would pay for any improvements Coeur d'Alenes might have in lands outside the boundaries of the proposed reservation. In return for the cession of their aboriginal territory, which was described in the agreement, the United States agreed to provide agricultural implements, two mills, a schoolhouse, and one hundred seventy thousand dollars at five percent interest, to be used to pay for a blacksmith, millers and other things that the President might deem proper to advance the civilization of the Indians. The agreement required approval by Congress to be binding (see Appendix III). It was signed by Shanks, Bennett, and Monteith on the part of the United States; Andrew, Vincent and six others on the part of the Coeur d'Alene; was witnessed by P. B. Whitman (who was also

listed as an interpreter) and Father Cataldo; and was interpreted by Whitman and a Nez Perce called Moons.[203]

This was a highly advantageous agreement to the Coeur d'Alene. They would receive a reservation larger than the one for which they had previously petitioned, one which specifically mentioned the rivers and lakes with which they were concerned, whose waters were to be protected and they were to receive all "privileges" with the area found within the boundaries. The line was drawn down the center of the channel of the Spokane River (see Maps 11 and 12), indicating that in fact riverbeds and lakebeds were meant to be a part of the reservation. Both the reference prohibiting water diversions and the line in the channel of the river indicate that both parties considered the channels, riverbeds and lakebed to be a part of the reservation. Tribal requests indicate they were concerned with future economic development and were thinking about future investment and use of natural resources on their proposed reservation. The tribal concern with economic development during this period is further evidenced and corroborated by Seltice's agreement with Frederick Post two years earlier.[204] Shrewdly, Seltice and the tribe were working to

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[203] Shanks to Sec. of the Interior, enclosing agreement with Coeur d'Alene, August 1, 1873, Letters Received, Idaho Superintendency, Microfilm, M 234, Roll 341, National Archives. [313]

Monteith to Commissioner, August 6, 1873, Letters Received, Idaho Superintendency, Microfilm, M 234, Roll 341, RG 75, National Archives. [315]

[204] United States. *The Statutes at Large of the United States of America, from December, 1889, to March 1891 . . .* , Vol. XIXVI,

protect their natural resources, both for their traditional uses, and for future economic development.

The Commissioner reported that pending the recommended ratification of that agreement, he arranged for a new Executive Order to set aside the land described in the agreement, "in order that white persons may be prohibited from settling thereon and claiming compensation for improvements from the Government." This was seen as a temporary measure, until the necessary legislation could be passed.[205] The Executive Order was signed by President U. S. Grant on November 8, 1873 (see Appendix IV and Maps 9 and 10). Coeur d'Alene River and Coeur d'Alene Lakes are mentioned as being within the boundaries of the new reservation, and the boundary line is drawn down the middle of the Spokane River channel, indicating that river and lake beds were, in fact, considered a part of the reservation.[206]

Washington, Government Printing Office, 1891, p. 1031 (26 Stat. 1031). [221]

[205] United States. Department of the Interior. Commissioners of Indian Affairs. "Annual Report for 1873," Washington, D. C.: Government Printing Office, pp. 385, 392. [234]

[206] United States. *Executive Orders Relating to Indian Reservations, From May 14, 1855 to July 1, 1912*, Washington, D. C., Government Printing Office, 1912, p. 72. [275]

Dept. of Interior file notice, November 8, 1873, Letters Received, Washington Superintendency, Microfilm, M 234, Roll 912, RG 75, National Archives. [316]

Royce, Charles C. "Indian Land Cessions in the United States." In *Eighteenth Annual Report of the Bureau of American Ethnology*, Washington, D. C.: Government Printing Office, 1899, pp. 866-869, Plate CXXIII. [151]

Father J. B. Brouillet travelled from France to the United States in 1847, and in that year crossed the Oregon Trail to work in the western Indian missions. He has been stationed with the Nesqually Diocese, but in 1872 was transferred to Washington, D. C. Father Joset, likely knowing of this appointment, probably advised Andrew Seltice to write to him with concerns he had, believing that Brouillet would wield influence in Washington. On August 17, Seltice wrote to Father J. B. Brouillet, telling him that at the close of the recent negotiations he had been ill, and "so I could not clearly see that some of my words were not in the papers" when they were translated for the Coeur d'Alenes. Since then, he said, the papers had been carefully interpreted for him by "some white men" and he had found that two important points were left out of the agreement. First, he had asked for separate schools for the boys and girls, the boys' school to be run by the Catholic Fathers and the girls' school to be run by the Sisters. Second, he said that the tribe did not want to have an Agent. They were happy with their relationship with the priests, and saw that tribes with agents had troubles, so they did not want to have an agent assigned to them.[207] Father Brouillet responded from Washington, D. C., saying he would show Seltice's letter to the President. He said that next winter all of the tribe's papers

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[207] Andrew Seltice to Father J. B. Brouillet, translated by Father Cataldo (copy transmitted to Indian office), August 17, 1873, Letters Received, Washington Superintendency, Microfilm, M 234, Roll 912, RG 75, National Archives. [317]

Schoenberg, Wilfred P. *A History of the Catholic Church in the Pacific Northwest, 1743-1983*. Washington, D. C.: The Pastoral Press, 1987, pp. 102-104 and 244. [158]

would go before Congress and he would be there looking after the tribe's interests.[208]

The points raised by Seltice with Father Brouillet were minor compared with the overall issue, whether or not there would be a Coeur d'Alene Reservation at all. The Coeur d'Alenes were fortunate that the Catholics intervened in their behalf, for without this assistance, there is little likelihood that they would have prevailed. On the other hand, though the priests certainly attempted to wield influence, it is apparent from the tone and details of the negotiations that the Coeur d'Alenes themselves were contributing to the content of the agreement. For seven years the priests at the mission had already been discussing a move to the vicinity of today's DeSmet. Had they wished to influence the United States in placing the tribe in that location on a reservation, it would have been relatively easy for them to have done so at this time. One must conclude that the Coeur d'Alenes understood the negotiations, as best they could, and pled in their own behalf, suggesting, at least, terms they, themselves, desired.

By mid-November, 1873, it became clear just how fortunate the tribe had been. On November 17, Shanks, Bennett, and Reed, the "Special Commissioners to Investigate and Report upon Indian Affairs in the Territory of Idaho, and Territories Adjacent Thereto," submitted their own report. They recommended a reservation in northern

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[208] Father J. B. Brouillet to Andrew Seltis, Chief of the Coeur d'Alene, September 8, 1873, Letters Received, Washington Superintendency, Microfilm, M 234, Roll 912, RG 75, National Archives. [318]

Idaho, upon which nine tribes could be settled, including the Coeur d'Alene. They explained that while in Lapwai, the agent to the Nez Perce had received instructions to negotiate with the Coeur d'Alenes. Shanks, and Bennett joined the Agent to the Nez Perce, J. B. Monteith and had met the Coeur d'Alenes on July 29, 1873 at Hangman's Creek. The Commission, however, had disagreements with the Nez Perce Agent. The commission reported that it did not approve of the proposed Coeur d'Alene Reservation because it had its own idea of removing that tribe to join nine other tribes on their proposed reservation. They now rejected the Coeur d'Alene agreement.[209]

> The commission did not desire to go beyond its authority in this matter, and only joined Mr. Monteith as there seemed to be a necessity for it at the time. But the commission, after an investigation of the whole subject, now recommends that the agreement entered into with the Coeur d'Alenes be not confirmed, but that the reservation recommended by the commission for the nine tribes, including the Coeur d'Alenes, be adopted.

The commission as a whole recommended establishing a very large reservation including all of the northeastern

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[209] United States. Department of the Interior. Commissioners of Indian Affairs. "Annual Report for 1873," Washington, D. C.: Government Printing Office, pp. 527-532. [234]

Shanks, Bennett, and Reed to Commissioner of Indian Affairs, November 17, 1873, Letters Received, Idaho Superintendency, Microfilm, M 234, Roll 341, RG 75, National Archives. [319]

corner of Washington and a small strip of Idaho's northwestern corner as a home for ten tribes: the Coeur d'Alenes, Upper and Lower Spokanes, Calispells, Pend d'Oreilles, Kootenays, Lakes, Colvilles, San Poels, Methows and O'Kinakanes. This report was submitted November 17, 1873, nine days after the President had already signed the Executive Order establishing the Coeur d'Alene Reservation. The report was too late to stop the establishment of the reservation, but was responsible for the failure of Congress to ratify the agreement made with the tribe. On December 4, 1873 the Acting Commissioner of Indian Affairs submitted the 1873 agreement to Congress, recommending its ratification.[210] However, four days later, on December 8, the Secretary of the Interior withdrew his support for ratification of the agreement:[211]

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[210] Clum to Secretary of the Interior, December 4, 1873, Records of the Bureau of Indian Affairs, Letters Received, 1874, Idaho, I 46, National Archives. [662]

[211] Secretary of the Interior to Commissioner of Indian Affairs, January 14, 1874, Records of the Bureau of Indian Affairs, Letters Received, 1874, Idaho, I 46, National Archives. [663]

Acting Commissioner to Secretary of the Interior, December 4, 1873, Letters Received, Idaho Superintendency, Microfilm, M. 234, Roll 342, RG 75, National Archives. [320]

Dozier, Jack. "History of the Coeur D'Alene Indians to 1900." M.A. Thesis, University of Idaho, 1962, pp. 89-91. [64]

Dozier, Jack. "Coeur D'Alene Country: the Creation of the Coeur D'Alene Indian Reservation in North Idaho." *Idaho Yesterdays* (1962), p. 3, who thought that the Coeur d'Alenes would have received more than "they had dared hope for," had the agreement been ratified. [63]

> Upon consultation with Hon J. P. C. Shanks, and in accordance with his suggestions, the letter to the Speaker of the House of Representatives, enclosing said Agreement was recalled and cancelled by the Department . . .

A contract was let to survey the new Executive Order Reservation. The agreement, however, was effectively dead with the Secretary of the Interior opposing it.[212] Despite the Secretary's opposition, and that of Shanks, *et. al.*, the Commissioner of Indian Affairs seemed to continue his support for ratification in his report for 1874, but by 1875 the agreement was all but forgotten.[213] In the

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[212] Surveyor General of Idaho to Commissioner of General Land Office, April 29, 1873, Letters Received, Washington Superintendency, Microfilm, M 234, Roll 912, RG 75, National Archives. These funds were to survey the 1867 reservation. [304]

Brown to Commissioner of Indian Affairs, December 30, 1873, Letters Received, Washington Superintendency, Microfilm, M 234, Roll 912, RG 75, National Archives, reporting that Thompson completed the survey of the 1867 reservation, before being told his contract had been voided. [321]

Contract, August 25, 1873, Letters Received, Washington Superintendency, Microfilm, M 234, Roll 912, RG 75, National Archives. This contract was to survey the 1873 Executive Order Reservation. [322]

[213] United States. Department of the Interior. Commissioners of Indian Affairs. "Annual Reports," 1874. Washington, D. C.: Government Printing Office, p. 367-368. [235]

United States. Department of the Interior. Commissioners of Indian Affairs. "Annual Reports," 1875. Washington, D. C.: Government Printing Office, p. 562, in which the Commissioner suggested removing the Coeur d'Alene to the Colville Reservation, apparently forgetting that they now had their own reservation. [236]

meantime, the proposal for the ten tribe reservation was submitted to Congress, with a provision to supersede the already existing Coeur d'Alene Reservation, and with a provision protecting tribal fishing rights in the rivers within the reservation, but the proposal had no support in Congress and was soon postponed indefinitely.[214] Reports in 1874 and 1875 indicated that the Coeur d'Alene continued to engage in traditional subsistence activities in their territory, through which there was now planned a line of the Northern Pacific Railroad.[215] By 1876 the Coeur d'Alenes were simply listed in Commissioner of Indian Affairs reports as "Indians in Idaho not

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[214] United States. Congress. *Congressional Record.* 43rd Congress, 1st Session. Washington, D. C.: Government Printing Office, 1874, pp. 774-775, 2089. [183]

United States. Congress. Senate. *A Bill to Create a Reservation in the Territory of Washington for the Coeur D'Alene and Other Indian Tribes.* Sen. Misc. Doc. No. 32. 43d Congress, 1st Session. Washington, D. C.: Government Printing Office, 1874. [210]

United States. Congress. House. *Proposed Indian Reservation in Idaho and Washington Territories.* Ex. Doc. No. 102. 43d Congress, 1st Session. Washington, D. C.: Government Printing Office, 1874. [198]

[215] United States. Department of the Interior. Commissioners of Indian Affairs. "Annual Reports," 1875. Washington, D. C.: Government Printing Office, p. 562. [236]

John B. Monteith to Edward P. Smith (C.I.A.), July 20, 1874, Letters Received, Idaho Superintendency, Microfilm, M 234, Roll 342, RG 75, National Archives. [323]

Diomedi, Alexander. *Sketches of Indian Life in the Pacific Northwest.* Fairfield, Washington: Ye Galleon Press, 1978 (originally published 1902), p. 66, noted that the tribe was aware of the new Northern Pacific line as a result of newspaper reports. [60]

under an agent."[216] The tribe was left with the priests acting as *de facto* agents on the reservation between 1873 and 1877, and during that period the priests continued to try to persuade the Coeur d'Alenes to move from the mission to a new site, away from the Mullan road, on the camas prairie to the south. The Coeur d'Alenes were outstripping the available agricultural fields, were too far from markets, and too close to encroaching whites according to the Fathers.[217]

Though the 1873 agreement was never ratified, the establishment of the 1873 reservation was a triumph for the Coeur d'Alene Tribe. More and more whites were pouring into the country, and there was terrific pressure to have the tribe removed to an already existing reservation. The intercession and assistance of the Catholics was of great help to the tribe in this instance, and helped result in the establishment, in 1873, of a 590,000 acre Executive Order Reservation that contained nearly all of their village sites, all of Lake Coeur d'Alene, a large section of the Coeur d'Alene River, a section of the St. Joe River, and their camas prairie. The relations between the tribe and the United States, the negotiations leading to the Executive Order, and the language in the agreement and Executive Order make it clear that the United States expressly intended to convey, to the tribe, title to the lake and rivers, including the lakebed and the riverbeds. The

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[216] United States. Department of the Interior. Commissioners of Indian Affairs. "Annual Reports," 1876. Washington, D. C.: Government Printing Office, 614. [237]

[217] Clark, Ella. "The Old Mission." *Idaho Yesterdays* Vol. 15, No. 3 (Fall, 1971): p. 25. [35]

Tribe, in turn, continued to be dependent on these resources for their livelihood and survival. Even though the agreement was not ratified, because of these negotiations, the United States, in effect, recognized the extent of Coeur d'Alene territory, that it had never been ceded to the United States, and that the tribe retained all of their original rights to that land. The Indian Claims Commission later concluded that the Coeur d'Alenes "held all the waters of Spokane River from a little above Spokane Falls to the sources, including Coeur d'Alene Lake and all its tributaries."[218]

VIII The Founding of DeSmet, 1876-1881

Events in the late 1870s and early 1880s would have a permanent effect on the available natural resources in Coeur d'Alene territory, and, consequently, permanent impacts on Coeur d'Alene life-style. The Coeur d'Alene

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[218] United States. Indian Claims Commission. "Findings of Fact." Docket No. 81, *The Coeur d'Alene Tribe of Indians v. The United States of America*, 1955, National Archives, pp. 4-6 and 4-10. [276]

United States. Indian Claims Commission. "Opinion." Docket No. 81, *The Coeur d'Alene Tribe of Indians v. The United States of America*, 1955, pp. 4-15 and 4-28. [277]

United States, Indian Claims Commission. "Commission Findings." In *Interior Salish and the Eastern Washington Indians I: the Coeur D'Alenes*. New York: Garland Publishing, Inc., 1974, pp. 304, 308, 313, 326 and 328. [648]

Bischoff, William N. "The Coeur D'Alene Country, 1805-1892." In *Interior Salish and Eastern Washington Indians I*. New York: Garland Publishing Inc., 1974, pp. 302, 308, 313, 326. [16]

lived in one of the most remote areas of the United States, and as a result were well insulated until this relatively late date from pressures

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X Steamboats Regulated on Lake Coeur d'Alene and a Commission is Established, 1885-1886

The country was becoming clogged with miners gripped with and motivated by an insatiable greed, clamoring for wealth, and imbued with incredible energy and durability. The discovery period in the Coeur d'Alene Mining District ran from 1882-1885, and led to the founding of Kellogg, Wallace, Gem, Mace, Milo, Burke and other mining towns and camps. Miners spread out everywhere. Many of these settlers encroached on Coeur d'Alene lands, cutting timber, staking mining claims and even trying to settle on the reservation. The Jesuits recognized the danger to Coeur d'Alene lands. Whites were urging that the reservation be opened and that the Coeur d'Alenes be removed. In response, the Jesuits hired John Mullan to press the Coeur d'Alenes' cause in Washington. Mullan's name had become well-known nationally for his extensive travel and exploration in the early 1850s while in the Topographical Engineers, for his books on the Mullan Road (which he constructed later in the 1850s and 1860s), and, ironically, for his role leading Nez Perce volunteers against the Coeur d'Alene during the Wright campaign. However, he had grown to know the Coeur d'Alene, he and tribal leaders now shared mutual respect, and now he was anxious to assist them in protecting their

rights. In addition, the contract was a good one for the Washington law firm that he had opened in 1878.[302]

Mullan feared that the reservation might not survive, and gave the Jesuits the following suggestions:[303]

> 1st, We must secure to the Coeur d'Alenes their reservation in perpetuity.
>
> 2nd, We must secure to the Coeur d'Alenes pay from the U. S. for the lands of the Indians taken by the U. S.
>
> 3rd, We must secure to the Coeur d'Alenes mechanics and workshops as we have secured for the Flatheads by an annual allowance. Besides, we cannot do so directly.
>
> 4. We must concentrate all the scattered Indians within the present Coeur d'Alene Reservation, first to save them, second to have that reservation to the Indians for all times. Now the practical question is to know how best these things can be done?

Mullan suggested getting Seltice to hold a Council and appoint a delegation to visit Washington with these requests. The Tribe should give advance approval for any arrangements that Seltice might make in Washington, and

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[302] Thrapp, Dan L. *Encyclopedia of Frontier Biography*, Vol. II. Glendale, California: The Arthur H. Clark Company, 1988, p. 1032. [178]

[303] Harms, Su, ed. *The Coeur D'Alene Teepee* Vols. I-III (1937-1940) (July 1980). Plummer, Idaho: Serento Press, p. 237. [79]

Peltier, Jerome. *A Brief History of the Coeur D'Alene Indians, 1806-1909*. Fairfield, Washington: Ye Galleon Press, 1981, p. 53. [132]

it would help if the Spokanes went with them. After the United States agreed to pay them, he said they should put up a woolen mill on the Coeur d'Alenes' Reservation, the blankets from which, Mullan thought, could be sold to all other reservations in the U.S. Mullan promised to arrange the trip.

Mullan's advice and influence in Washington would be helpful, if not instrumental, during the next three years of negotiations with the United States. Historian Jack Dozier concluded:[304]

> Using whatever influence he possessed, he aided the Coeur d'Alenes' cause whenever possible during the decade of 1880-1890. He wrote several letters to officials in Washington in which he recounted the reasons why a treaty had never been established, told of the seizure of Coeur d'Alene [aboriginal] lands without payment, spoke of their exemplary character and requested that protection of their tribal domain be afforded.

On March 23, 1885, Seltice and the Coeur d'Alenes submitted a petition through Resident Farmer O'Neill, their long-time friend and ally. O'Neill submitted the petition to Agent Waters with a strong letter of support, saying he had known the tribe since 1861.[305]

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[304] Dozier, Jack. "History of the Coeur D'Alene Indians to 1900." M.A. Thesis, University of Idaho, 1962, p. 93. [64]

Dozier, Jack. "Coeur D'Alene Country: the Creation of the Coeur D'Alene Indian Reservation in North Idaho." *Idaho Yesterdays* (1962), p. 4. [63]

[305] O'Neill to Waters, March 20, 1885, and enclosure, Letters Received, Record Group 75, National Archives. Emphasis in original. [401]

In 1866 when Agent for the Nez Perces at Lapwai, I was directed by Gov. Ballard, Ex Officio Supt. of Indian Affairs for Idaho to proceed to the country of these people and learn whether they desired removing to the Flathead reservation, or if not to [settle?] in their own country a suitable place for their reservation, upon that visit I saw that they were working *then* when it was considered by an Indian a disgrace to work, and when it was almost impossible to procure the necessary implements to work with, but in their fences and in what little farming could be done where they were then located they showed thrift and progress totally unexpected in that day.

In 1875, "Nicodemus" one of the tribe first commenced farming upon the present reserve, in the spring of 1876 two or three more opened small farms, in 1877 & 1878 they all commenced making small farms in different localities upon the reserve from "Stellam" village of [farms?] upon the Spokan near Cowley's bridge running south to the present mission nearly 40 miles, embracing with that distance some six or seven villages, the largest being near the present mission the De Smet at the head of the Latah or Hangman Creek, nearly two hundred farms have been opened for the first two or three years they struggled along as best they could being poor and unable to purchase necessary farming implements, the only help they had was through the Fathers connected with the mission in furnishing plows & other tools, and advice. At the present time their farms, fences, houses, &c show the effect of the good teaching they have received, *all* of the males are good farmers, many of them, the older ones, having two or

> three hundred acres of land under a good substructural [?] rail fence and under construction, the younger men of the tribe, [?] as good workers and nearly as willing, but receiving no aid from the Govt except in their schools have not the means to go where as they would wish, with the exception of one or two trappers, old men, *all* are farmers. You see no long hair worn by them, no blankets, no moccasins, *all*, men and women wearing the dress of whites, by their own labor and exertions so far with, as before stated the school.

He said they now had 150 wagons, 160 plows, were cutting timber, and were "deeply interested" in education. He earnestly asked for the Agent to comply with their requests.

The Coeur d'Alenes' petition [see Appendix V] was addressed to the President of the United States, the Secretary of the Interior and the Commissioner of Indian Affairs.

> Your Petitioners the Coeur d'Alene Indian Tribe . . . desire to hereby make known to you the fact that their rights as Indians have, up to this date, been very largely neglected by the proper authorities of the United States; by reason of which a large and valuable portion of their country has been taken possession of and is now used, cultivated and occupied by the whites, and without any compensation or indemnity ever having been given them therefor.

The Coeur d'Alenes again reminded the United States of their help during the Nez Perce War, and enclosed copies of petitions from whites at the time who supported the Coeur d'Alenes' rights to their lands. They reviewed their

boundaries, "owned by your Petitioners and by their forefathers from time immemorial," and included a description of the boundaries of their aboriginal territory. They pointed out that many of these lands had been taken by whites without any payment to them. Many valuable mining claims had been staked on those lands, they noted, including gold, silver and lead mines. Much timber was being cut and floated down the Spokane River for sale. These lands also included many other valuable sections.

> It includes the Coeur d'Alene Lake and Coeur d'Alene River, upon the waters of which steamers now run. It includes the beautiful site of the Military Fort at Coeur d'Alene; besides numerous thriving towns and villages, it includes the line of the Northern Pacific Railroad from near Spokane Falls to the Pend d'Oreille Lake, and it also includes one of the valuable portions of the Land Grant to the Northern Pacific Railroad Company.

The tribe said it knew that Congress established provisions in 1854 and gave authority to negotiate treaties of cession, but that late Gov. Stevens failed to negotiate a treaty with them as a result of a war. Since that time they had tried to negotiate a treaty but failed.

> Your Petitioners desire still to maintain peace with all the whites and especially with those whites to whom their country described as aforesaid has become valuable and by whom the same is now largely occupied.

They said that they needed sawmills, and help to encourage their industry.

> In view of all these matters therefore your Petitioners now ask that you may be pleased to send them a proper Commission of good and honest men authorized and empowered to consider all these facts, and such other facts as their visit to us may disclose, and to provide for our present and future wants and to make with us a proper treaty of peace and friendship and enter into such proper business negotiations under and by which your Petitioners may be properly and fully compensated for such portion of their lands not now reserved to them; That their present reserve may be confirmed to the Missionary Fathers and Sisters, and that ample provision be made by the United States by which their compensation shall be annually made them partly in stock, tools, mills, and meckanical [sic] instruction by proper mechanics for the permanent benefit of every member, young and old, male and female of the Coeur d'Alene Tribe of Indians . . .

The petition was written by Louis Kaizewet, a boy educated at the mission school, and signed by Seltice and forty-seven Coeur d'Alenes, and witnessed by John M. Sweeney, M.D., Colville Farmer, and four other non-Indians (Connell, Purcell, Evans, Cunningham). Attached were the 1877 petitions from whites supporting the tribe.[306]

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[306] O'Neill to Waters, March 20, 1885, and enclosure, Letters Received, Record Group 75, National Archives. [401]

Dozier, Jack. "History of the Coeur D'Alene Indians to 1900." M.A. Thesis, University of Idaho, 1962, p. 94. [64]

Agent Waters, in turn, submitted the petition and the letter from O'Neil to the Commissioner.[307]

> The Indians of this Tribe now numbering over 500 were once accounted the most cruel Indians of the North West, but under the backing of the Jesuit Fathers have fast approached a civilized state.

He said they should receive some aid in this matter and reviewed their history and lack of a treaty.

> Their reservation set aside by Executive Order is looked upon with longing eyes by the whites who are fast settling up the country owned by these Indians for they have never been recompensed for a foot of it. Even the men whose property and stock the Indians took care of so faithfully during the Nez Perces war of 1877-8 are ready to step in and possess themselves of their reservation. The Indians are continually hearing of petitions being circulated praying Congress to open to settlement this reservation, but before this is done these scattering tribes who are wandering here and there without homes . . . should be provided with homes on this reservation . . .
>
> I cannot too earnestly plead for these Indians and pray that their petition may be granted. I am thoroughly conversant with their needs and know whatever is done for them is money well spent. They are not murderers and cut throats, but are human beings who plead for justice from

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[307] Waters to Price, March 26, 1885, Letters Received, Record Group 75, National Archives. [402]

> a great government, that they may be recompensed for their lands taken from them.

The agent also recommended that a commission be established to deal with them.

The Commissioner responded in May, 1885, that he had received the petition from Seltice and the other Coeur d'Alenes and that the petition and accompanying papers provided sufficient reason to base a request to Congress for a commission to negotiate with the tribe. He submitted the papers to the Secretary of the Interior, formally requesting the establishment of a commission to deal with the Coeur d'Alenes, not only for the purpose of quieting title to their former aboriginal territory, but to formally remove scattered bands of Spokanes to their reserve.[308]

Although the major period of discovery in the Coeur d'Alene mining district had closed, the period of immigration was still well under way, and non-Indian population of the region was growing daily. With that population came continued, and increasing problems of trespass and illegal timber cutting, including complaints

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[308] Commissioner to Waters, May 14, 1885, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [403]

Price to Waters, February 26, 1885, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [404]

Price to Secretary of the Interior, February 4, 1885, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [405]

against Frederick Post, who was now firmly ensconced at Post Falls on the Spokane River.[309] An outbreak of smallpox at the Coeur d'Alene school was, no doubt the result of the gold rush.[310] Whites continued to write and petition the Indian Office in hopes that the reservation would be opened to non-Indian settlement and/or use.[311] The Commissioner remained adamant about strictly enforcing the law within the reservation boundaries. In November, 1885, newly appointed Colville Agent Benjamin P. Moore, reported that a licensed trader had constructed a building at one of the landings on Lake Coeur d'Alene for the purpose of storing, overnight, goods that were to have been unloaded from boats and removed from the reservation by wagon to the mining fields the next day. He said, "that in doing this the wagons are compelled to go about 200 yards over the reservation; and that among the merchandize there are sealed casks of liquors." The agent asked if that was permissible, and the Commissioner replied in no uncertain terms, that the law "prohibits the

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[309] Price to Waters, March 14, 1885, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [406]

Waters to Price, April 2, 1885, Letters Received, Record Group 75, National Archives. [407]

John A. Simms to Atkins, April 28, 1885, Letters Received, Record Group 75, National Archives. [408]

[310] Waters to Atkins, April 18, 1885, Letters Received, Record Group 75, National Archives. [409]

[311] Many Citizens to General Land Office, September 13, 1885, enclosing map, Letters Received, Record Group 75, National Archives. [410]

Reed to Vorhees, December 26, 1885, Letters Received, Record Group 75, National Archives. [413]

introduction of ardent spirits, under any pretense, into the Indian Country." He went on to say that his office "leaves no discretion" on this issue, and "permission cannot be given the trader to store or transport liquor as requested."[312]

In 1886 the first silver and lead ores were shipped from new mines in the Coeur d'Alene district for smelting.[313] The gold rush continued, and with it came increasing needs and wants on the part of the white settlers. Entrepreneurs soon began to hunt and fish in the area to provide for the miners and prospectors.[314]

> The St. Joe country abounded in fish, ducks, birds, deer, bear – all kinds of game. It became known as the finest trout stream in America, and anglers came from all over the country to fish in it. Unfortunately, commercial fishermen soon followed, scooping out trout by the ton. Spokane markets paid ten cents a pound for a catch laid down at head of navigation. Before long the fishermen took to dynamiting the river, picking up loads of fish to sell in Spokane or in

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312 Upshaw to Moore, November 6, 1885, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [411]

313 Jones, Fred O. "A Valuation Study of the Mineral Resources of the Lands Ceded by the Coeur D'Alene Tribe of Indians on March 3, 1891." Expert Testimony submitted in behalf of the Coeur d'Alene Tribe, *Coeur d'Alene Tribe v. United States of America,* Indian Claims Commission, Docket 81. Spokane, Washington, May, 1956, p. 184. [95]

314 Hult, Ruby El. *Steamboats in the Timber.* Caldwell, Idaho: The Caxton Printers, Ltd., 1953, p. 72. who noted that the Idaho legislature passed law against commercial fishing on the St. Joe River. [88]

> the mining country. But they did not gather up all they killed and for miles the river was strewn with dead fish.

In addition to food, the miners and prospectors consumed large volumes of liquor. The transport, delivery and consumption of liquor caused new problems for the Coeur d'Alene Tribe in 1886, and caused the United States government, at the highest level, to examine the reservation and tribal ownership of Lake Coeur d'Alene. Throughout 1886 there were continued reports of the distribution of liquor on the reservation. There were reports of sales to Indians, transport of liquor on reservation territory, and even a report of trespassers setting up a saloon on the Catholics' land at the Old Mission landing.[315] But the most important infraction involving liquor that was discovered during 1886 involved its transport and sale on board steamers while on Lake Coeur d'Alene.

As a result of complaints filed with the Department of the Interior, an investigation was begun in 1886 into the sale of liquor on board steamers while on Lake Coeur

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[315] *Hayden v. Frost, et al,* Idaho Territorial Court; March, 1887; Sacred Heart Mission Archives. [412]

McFarland to Atkins, May 14, 1886, Letters Received, Record Group 75, National Archives. [414]

R. E. McFarland to Commissioner J. D. C. Atkins, June 1, 1886, Letters Received, Record Group 75, National Archives. [415]

Atkins to Moore, January 6, 1886, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [416]

Atkins to Moore, March 11, 1886, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [417]

d'Alene, inside the Coeur d'Alene Reservation. Numerous depositions and statements were taken and it was determined that liquor had been for sale on the reservation on the steamboat "Coeur d'Alene." Witnesses described an open bar on board the steamer as it navigated across the waters of Lake Coeur d'Alene and the Coeur d'Alene River inside the Coeur d'Alene Reservation. Liquor was served both while the steamboat sailed and while it was docked inside the reservation boundaries. Extensive affidavits provided evidence of this sale on board the boat while steaming across Coeur d'Alene Lake. The Register of the United States Land Office at Coeur d'Alene, Robert E. McFarland, testified that while the steamer was tied up at the Old Mission, whiskey was served. As a result of the investigation, the owner of the steamer was formally charged with selling whiskey on the reservation (that is, on board the steamer).[316] By 1886

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[316] Sec. of War to Sec. of Interior, July 3, 1886, Letters Received, Record Group 75, National Archives. [418]

McFarland to Sec. Atkins, June 28, 1886, submitting various affidavits, Letters Received, Record Group 75, National Archives. [419]

Affidavit of George McCabe, June 24, 1886, Letters Received, Record Group 75, National Archives. [420]

Affidavit of Robert E. McFarland, June 28, 1886, Letters Received, Record Group 75, National Archives. [421]

Affidavit of Charles Smith, December 19, 1886, Letters Received, Record Group 75, National Archives. [422]

Affidavit of Silas Greestable, June 22, 1886, Letters Received, R. G. 75, National Archives. [423]

Upshaw to Moore, May 24, 1886, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [424]

published guide-books were describing the steamers and their routes to the goldfields.[317] This matter was considered of grave importance and the Acting Inspector General of the Army was dispatched to Coeur d'Alene to determine the facts in the case.

H. M. Lazelle, Acting Inspector General reported to the Adjutant General of the Army on July 27, 1886 that he had investigated the reports of the sale of whiskey on Lake Coeur d'Alene, as he was ordered to do.[318]

> It is to be observed that, with the exceptions of a few indentations on its northern coast, the entire lake of Coeur d'Alene, and about twenty-five miles of the river of Coeur d'Alene – from the mouth up, as far as the landing on that river, known as the "Old Mission" – lay wholly within the Coeur d'Alene Indian Reservation.

The steamer "Coeur d'Alene" made three round trips each week, according to Lazelle, from Coeur d'Alene to the Old Mission, "its entire course is within the limits of the Coeur d'Alene Indian Reservation" (see Map 13), stopping *en route* at Rockford and Farmington Landings. Each of the landings was reached via a road which led to small towns outside the reservation.

Moore to Atkins, March, 1886, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [425]

317 Anon. *The Great Northwest: A Guide-Book and Itinerary for the use of Tourists and Travelers over the lines of the Northern Pacific Railroad . . .* St. Paul: Riley Brothers, 1886, p. 297. [3]

318 Lazelle to Adjutant General, July 27, 1886, Letters Received, Record Group 75, National Archives. [426]

Figure 29: Ore from the Coeur d'Alene mines was loaded on the steamers at the old mission. From Kowrach & Connolly [101], p. 261.

> From the time of leaving the town of Coeur d'Alene to the Old Mission, on the 23rd, and from the Old Mission to the first named place on my return trip, on the 24th, instant, an open bar was kept on the boat, at which drinks of various sorts of liquor, were very freely and frequently sold.

While he was carrying out his inspection, the bar was closed as the steamer docked.

> Of the statutory violation by the owners of the steamer "Coeur d'Alene," in my judgment, it is fully susceptible of proof that Sec. 2139, R. S., is now, and has for more than a year past, been constantly transgressed, by the wilful introduction, storage, and sale of liquor within the limits of the Indian reservation . . .

He recommended having the United States Attorney seize the boat.

> The mining enterprises in the Coeur d'Alene mountains have already, in the opening and developing of mines and attendant interest, absorbed some hundreds of thousands of dollars capital. By reference to the topographical sketch inclosed, it will be seen that there is a route to the mines over the old Mullan road; and that there is another route from Thompson, Montana; so that the mining interests are not dependant upon the route across the lake through the Indian reservation, though no doubt such route is the most expeditious.

Lazelle's report was considered so important that the Secretary of War informed the Secretary of the Interior that they should discuss the matter at a Cabinet meeting

on August 10, 1886.[319] The day after the Cabinet meeting the Secretary of the Interior sent the Commissioner of Indian Affairs a communication, telling him to handle this "violation of law relating to sale of liquor" on the Coeur d'Alene Reservation."[320]

This investigation and the determination of the violation of law was to have far-reaching effects in the following years. At the highest levels of government, the United States had formally acted on its recognition that Lake Coeur d'Alene was a part of the 1873 Executive Order Reservation. Officials of the military, the Interior Department, the Indian Office and the General Land Office were informed that the lake was a part of the Coeur d'Alene Reservation, and that laws governing Indian territory had to be enforced on the lake. This was seen as a severe restriction on non-Indians' ability to carry out their business on the lake. In response to the ruling, the Resident Farmer on the Coeur d'Alene Reservation acted to eject people he found fishing on the Lake and its tributaries within the reservation boundaries.[321]

With John Mullan and the Jesuits assisting them, Seltice and the Coeur d'Alenes were finally successful in

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[319] Secretary of War to Secretary of Interior, August 9, 1886, Letters Received, Record Group 75, National Archives. [427]

[320] 1st Asst. Secretary of the Interior, Note to File, August 11, 1886, Letters Received, Record Group 75, National Archives. [428]

[321] F. Holmes, Resident Farmer to Gwydir, August 14, 1888, Letters Received, Record Group 75, National Archives. [429]

1886 in seeing the establishment of a commission to negotiate an agreement with them to quiet title to their aboriginal homeland. The petition signed by Seltice and others was submitted to Congress in 1886 along with a letter from Mullan, which was drafted after consultation with Father Cataldo. Mullan explained the history of the Coeur d'Alenes' relations with the United States and recommended that a group of Coeur d'Alenes be brought to Washington to conclude an agreement.[322] In late March, 1886, the Senate sent a resolution to the Secretary of the Interior, asking for any information relative to removing the Spokanes and Coeur d'Alenes to another reservation, and to any claims they might have against the United States. The Acting Secretary of the Interior responded with a report, which included the text of the 1885 petitions from Seltice asking for compensation for the tribe's aboriginal holdings, petitions from whites protected by the Coeur d'Alenes during the Nez Perce War, and the letter from John Mullan recommending that a commission be established to negotiate with the tribes.[323] As a result of Seltice's petition and the work of John Mullan, on May 15, 1886 Congress created the Northwest Indian Commission, empowered to negotiate agreements with tribes, including the Coeur d'Alenes. Members were

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[322] United States. Congress. House. *Ratification of Coeur D'Alene Indian Treaties in Idaho.* Report No. 1109. 51st Congress, 1st Session. Washington, D. C.: Government Printing Office, 1890. [206]

[323] United States. Congress, Senate. *Letter from the Acting Secretary of the Interior.* Ex. Doc. No. 122. 49th Congress, 1st Session. Washington, D. C.: Government Printing Office, 1886. [212]

John V. Wright, Jarred W. Daniels, and Harry W. Andrews. The Commission was authorized to negotiate with the Coeur d'Alene for the cession of their aboriginal territory.[324]

XI An Agreement is Reached, but Pressures Increase, 1886-1887

With mines in full production and ore being shipped out of the mining district, the huge big-stakes race to build rail lines into the mining fields was on. The Washington and Idaho (W&I), with the backing of the Union Pacific (UP), which also eventually acquired the OR&N, went up against the Northern Pacific. UP began to build lines from Spokane, while the NP connected the fields with Missoula. All of the rail companies needed express permission from the tribe in order to obtain a right-of-way through the reservation. The first of several of these agreements with the Coeur d'Alene Tribe was reached in 1886. The first rail line to the growing town of Coeur

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[324] Dozier, Jack. "Coeur D'Alene Country: the Creation of the Coeur D'Alene Indian Reservation in North Idaho." *Idaho Yesterdays* (1962), p. 4. [63]

Dozier, Jack. "History of the Coeur D'Alene Indians to 1900." M.A. Thesis, University of Idaho, 1962, p. 96. [64]

United States. Congress. House. *Reduction of Indian Reservations*. House Executive Document No. 63. 50th Congress, 1st Session. Washington, D. C.: Government Printing Office, 1888. [203]

24 Stats., 44. 49th Congress, 1st Session, Chas. 333, p. 44. [649]

d'Alene was completed in the same year.[325] A telephone/telegraph line also reached the small settlement at the Old Mission in 1886, which allowed current silver and gold quotations to be obtained from the New York marketplace.[326]

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[325] Wood, John V. *Railroads Through the Coeur D'Alenes.* Caldwell, Idaho: The Caxton Printers, Ltd., 1984, p. 26. [290]

"Agreement" (with attached departmental objections), December 29, 1886, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [430]

Commissioner to Moore, December 9, 1886, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [431]

Upshaw to Moore, October 25, 1886, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [432]

Secretary to Commissioner, October 18, 1886, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [433]

Commissioner to Moore, July 28, 1886, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [434]

Secy. of the Wash. & Idaho RR Co. to Moore, July 20, 1886, with enclosures, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [435]

Atkins to Moore, August 4, 1886, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [436]

[326] Bischoff, William N. "The Coeur D'Alene Country, 1805-1892." In *Interior Salish and Eastern Washington Indians I.* New York: Garland Publishing Inc., 1974, p. 256. [16]

White settlers continued to pour into the area and the small towns boomed. Prostitutes plied their trade in the towns, gunfights occurred, and saloons did a lively business – Wyatt Earp even opened a saloon named the White Elephant.[327] The War Department and Fort Coeur d'Alene also wanted a portion of the reservation for a target range.[328] Whites continued to pressure the United States to provide access to Coeur d'Alene timber, but the government resisted and the Coeur d'Alenes did what they could to create some income selling deadfall. All of this caused more and more whites to call for the opening of at least a portion of the reserve.[329] Activity in both the

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[327] Magnuson, Richard G. *Coeur D'Alene Diary; the First Ten Years of Hardrock Mining in North Idaho*, 1968, p. 13. [109]

[328] Lamar to Sec. of War, May 14, 1886, Letters Received, Record Group *75*, National Archives. [437]

Atkins to Secretary of the Interior, May 12, 1886, Letters Received, Colville Agency, Record Group *75*, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [438]

Lamar to Secretary of War, May 14, 1886, Letters Received, Colville Agency, Record Group *75*, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [439]

[329] O'Neill to Moore, January 2, 1886, Letters Received, Record Group *75*, National Archives. [440]

Colville Agent Benjamin P. Moore to Commissioner Atkins, January 4, 1886, Letters Received, Record Group 75, National Archives. [441]

Moore to Atkins, March 20, 1886, Letters Received, Record Group *75*, National Archives. [442]

Moore to Atkins, March 26, 1886, Letters Received, Record Group *75*, National Archives. [443]

House and Senate was generated by whites who wanted the reservation opened.[330]

While happy that the Northwest Commission had been established and would finally negotiate with them, Seltice and the Coeur d'Alenes expressed serious concerns about threats to their reservation. Seltice suggested that he and other leaders travel to Washington to discuss both the threats to their reservation and the proposed rail lines through the reserve. The Commissioner complimented Seltice, but said a visit wasn't necessary at that

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Morris to Moore, November 17, 1886, Letters Received, Record Group *75*, National Archives. [444]

Atkins to Moore, December 17, 1886, Letters Received, Colville Agency, Record Group *75*, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [445]

Atkins to Moore, January 25, 1886, Letters Received, Colville Agency, Record Group *75*, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [446]

Upshaw to Moore, September 22, 1886, Letters Received, Colville Agency, Record Group *75*, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [447]

Morris to Land Commissioner of U.S., November 17, 1886, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [448]

[330] Representative Hailey (Idaho) to Indian Office, May 17, 1886, Letters Received, Record Group 75, National Archives. [449]

Notes relative to responding to a Senate Resolution, (1886), Letters Received, Record Group 75, National Archives. [450]

time, adding that negotiations to place Spokanes on the Coeur d'Alenes' reserve would shortly take place.[331]

There were, however, responses from the public in support of the Coeur d'Alenes' rights to their land. A letter to the editor of the *Spokane Review* signed "Traveler" recounted the history of the Coeur d'Alenes' friendship with the whites and said their reservation should not be opened, as some were demanding. The Indians knew how to use the bottom lands along the river as well as anybody, said the author, and were working the lands to good effect, especially lands that were engulfed under water part of the year. The agent commented that the letter was a good response to the petition recently sent to

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[331] Saltice to O'Neill, March 8, 1886, Letters Received, Record Group 75, National Archives. [451]

O'Neill to Moore, March 13, 1886, Letters Received, Record Group 75, National Archives. [452]

Moore to Atkins, March 25, 1886, Letters Received, Record Group 75, National Archives. [453]

Seltice *et al.* to Secretary of the Interior, November 29, 1886, Letters Received, Record Group 75, National Archives. [454]

Atkins to Moore, April 16, 1886, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [455]

Upshaw to Moore, October 23, 1886, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [456]

United States. Department of the Interior. Annual Report of the Commissioner of Indian Affairs, 1886. Washington, D. C.: Government Printing Office, 1886, pp. 108 and 449, which also reported that one Coeur d'Alene man was "running a stage from the boat-landing on the lake to Farmington . . . and is making a good living." [247]

Washington to open the reservation.[332] That petition came from citizens of Nez Perce County, Idaho Territory, and prompted another response in support of the tribe. The pupils of the St. Ignatius Indian School on the Flathead Reservation, under the direction of Father Lawrence Palladino, published a pamphlet entitled, *Our Friends the Coeur D'Alene Indians.* The publication was produced by pupils including Moise, Maxim, and Baptist, because they had "learned by the newspapers the great anxiety caused to your [the Coeur d'Alene] nation by some white settlers." On opposite pages in the publication were printed the charges made in the above-mentioned "Petition of Freeholders of Whitman County, Washington Territory, and Nez Perce County, Idaho," and the responses made by Seltice and the Coeur d'Alenes reprinted from "Indians in Council" in the April 24, 1886, *Spokane Falls Review.*[333]

The petition was purported to have come from freeholders of Nez Perce County, Idaho and Whitman County, Washington Territory. The authors of the pamphlet, however, suggested that the attempt to open the reservation was meant not only to benefit whites at the expense of Indians, but had religious overtones as well (Nez Perce County being Protestant country). The white petition asked that the Coeur d'Alenes be allotted and

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[332] Moore to Atkins enclosing newspaper clipping, April 16, 1886, Letters Received, Record Group 75, National Archives. [457]

[333] Pupils of St. Ignatius Indian School. *Our Friends the Coeur D'Alene Indians.* St. Ignatius, Montana: St. Ignatius Indian School, 1886. [138] See Palladino [123] for reprint of full text.

that the remainder of their land be opened to non-Indians. "That the white settlers should wish for the permission to seize upon the coveted lands of the Indians needs no explanation other than the natural desire of human nature to benefit itself . . . " The white petition argued that the Coeur d'Alenes had become intelligent, civilized, and christianized, and have long since discarded their aboriginal habits and costumes and have adopted the manners and customs of the whites in almost every respect. . . . That said Indians now dwell in well built and commodious houses, have large bodies of land under fence, cultivate the same whith [sic] improved modern machinery, raise large quantities of those cereal products adapted to the soil, operate saw mills, raise cattle, and horses in large numbers, have capacious Churches and School buildings which well attended . . . " and that they did not participate in the Nez Perce war and protected whites from the Nez Perce. These facts, said the whites, suggested that the Indians should be allotted and their reservation opened. But the priest to the Coeur d'Alenes argued that while it was true the Coeur d'Alenes were civilized, they had "the **simplicity of a nascent civilization,**" they were innocent and naive and would be easily duped out of their rights by whites. The citizens of Pine Creek also submitted a testimonial in support of the tribe, thanking the Coeur d'Alenes for protecting them from the Nez Perce. The petition asked Congress to grant the Coeur d'Alene "good title to your land." The publication reprinted the Coeur d'Alenes' recent petition to Congress, and described efforts to

receive payment for their aboriginal lands. The publication noted that the reservation included Lake Coeur d'Alene:

> comprises a mountain range, a large lake, several rivers and a considerable amount of lowland liable to inundation. Consequently the mere number of given acres is misleading, since it might be concluded that they were all available for farming lands.

The Nez Perce County people said they needed the Coeur d'Alenes' timber, but the authors replied, "Are the Indians to be deprived of their timber lands solely because the neighboring white settlers need them?" They concluded that settlers should rather, "let them petition Congress for the necessary permission for the Indians to sell them lumber. The fact that the Coeur d'Alene tribe owns a large extent of timber land proves nothing except that they are better off in this respect than those who covet, but do not possess, these same forests." The Tribe derived income from their resources, collecting a small "tax" from whites who grazed on their reserve, but they said they did not collect a tax at the landings, though they could. They also received small payments for wood cut on the reserve, but stated that now they objected to whites taking any more of their wood. Seltice added that they wanted ammunition to go hunting.[334] The white petition asking for the allotment of the reservation, and the published response probably made the issues related

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[334] Palladino, Lawrence. *The Coeur D Alene Reservation and Our Friends the Coeur D Alene Indians.* Fairfield, Washington: Ye Galleon Press, 1967. Bold in original. [123]

to the Coeur d'Alenes' Reservation much more public, and made it more likely that Congress would examine the situation.

Against this backdrop of continuing controversy and efforts by whites to gain the opening of the Coeur d'Alene Reservation, the Northwest Commission traveled to DeSmet early in 1887 to negotiate an agreement with the tribe, by which the Coeur d'Alenes would formally cede their aboriginal territory and agree to allow bands of Spokanes to settle on the reservation with them. The commission reached Spokane Falls on February 23, 1887, and first met with Spokanes, who wanted their own reservation, but were denied that possibility by the Secretary of the Interior. The Upper and Middle Bands of the Spokanes agreed to resettle on the Coeur d'Alene Reservation. After completing the agreement with the Spokanes, the Commission traveled to Farmington and from there to DeSmet. Seltice met the group along the road, accompanied by forty armed and mounted men (evidently Soldiers of the Sacred Heart), who fired their Winchesters in the air and paraded by the Commission as they welcomed them to the reservation. The entire tribe met the Commission in DeSmet, and the meeting began with speeches by Seltice and the Commissioners. Every Coeur d'Alene then rose and shook hands with the Commissioners. March 23, 1887 was the first day of Council with the Coeur d'Alene. Commissioners Judge Wright, Dr. Daniels, and Major Andrews were present, along with "the chiefs and bands of the Coeur d'Alenes and the interpreter.[335]

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[335] United States. Congress. House. *Reduction of Indian Reservations*. House Executive Document No. 63. 50th Congress,

The Commissioners reported that the reservation was the best they had yet seen. "The Indians are industrious, thrifty, provident, and good traders." The Coeur d'Alenes were said to be friends of the whites, who had protected white property during times of conflict with other tribes. Polatkin, a schoolboy made an eloquent address to the Commissioners, and a schoolgirl also addressed the Commissioners eloquently, while other children discussed spelling with the Commissioners. Much of the activity was carried out in English and it was evident that most if not all of the children, at least, spoke English.

The formal meeting opened with a prayer. Judge Wright opened the session by explaining the Commissioners' objectives. The Commissioners referred to Senate Executive Document 122, 49th Congress, lst Session, in which a petition from the Coeur d'Alene "setting forth their claim and the boundaries of the land in question" was reproduced. The Commissioners noted that the Northern Pacific Railroad passed through the northern portion of their lands, and also reported on the history of Stevens' failed action with the tribe. All of this was reviewed by the Commissioners with the tribe. The Commission also obtained a copy of the 1873 agreement from the files at the DeSmet Mission and made a copy of that document to submit with their report. They used this agreement in determining the amount of compensation that was due to the tribe. The Tribe was very anxious to cement their relationship with the United States and do

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1st Session. Washington, D. C.: Government Printing Office, 1888, pp. 9-11, 30-43, 53-56, and 60-65. [203]

what was necessary to protect their remaining reservation lands.

> The anxiety of the Indians about their reservation and their fears that it might in some way be taken away from them, their unexampled good conduct, their friendship for the neighboring whites, displayed on a late memorable occasion [the Nez Perce War] their rapid advancement in self-support and civilization unaided by the Government, their willingness to allow their reservation to be filled up with Indians, the confidence they repose in the Government to settle their claim on its own terms, all conspired to cause us to put in the fifth clause, which provides that their reservation shall be held forever as Indian land as homes for the Coeur d'Alenes and such other Indians as may be removed thereto, and that no part of the reservation shall ever be sold or occupied, open to white settlement, or otherwise disposed of without the consent of the Indians.
>
> It may be said that this was unnecessary, inasmuch as no such thing would happen; but the loss of their former possessions and other causes had so excited their fears that it was concluded, in order to allay suspicion, and in as strong a manner as possible, bind the Government to that good faith which the Indian prizes so highly and which he thinks has been violated so frequently.

Seltice addressed the commissioners. He made a rather long speech, in which he said the tribe had "listened very carefully and understood everything that you have said, and it was good." He added that "half-breed" Spokanes

could settle there too, adding that although whites married Indian women, Coeur d'Alene men never married white women. He said he had considered everything the commissioners had said, and that the Spokanes could come, but should not bring cards or whiskey. Then he addressed the issue of lost land, "lost to us; it is dead to my people."

> You say we may receive for our lost land $150,000 – for our land outside the reservation. Do you know how much there is of it? There are more than 4,000,000 of acres. This land was very dear to us, but we have given it up to the whites. We have only a small part of our country – I mean this reservation . . .

Then he implored the Commission to protect what lands they had left. He described their homes, and farms, their schools and their graves.

> The Government has now thought of our claims for our lost land, and they have sent you to us. Of this we are glad, but neither money nor land outside do we value compared with this reservation. Make the paper strong; make it so strong that we and all Indians living on it shall have it forever.

Wright responded that the Government would protect their lands. "It will do so if it takes its whole power."

The Commissioners presented the draft agreement to the Tribe. "The agreement was then read to them by Commissioner Andrews, and each section carefully interpreted, to which the Indians gave marked evidence of approval."

> Chief Seltice and his people manifested great concern about the future of their reservation. The clamor of the whites for the opening of the reservation had reached their ears and made their hearts heavy. The fact that all their land since this reservation had been taken from them without even the pretense of the asking, and the rapid increase of white settlers around them were calculated to arouse their fears. They had no treaty relations with the Government and had no assurances of its fostering care. The visit of the Commission, and more especially when it was known that its visit was of the most friendly character, filled their hearts with gratitude and hope, which were manifested in their faces, their tone, and their expressions.

The Commissioners promised that the United States would protect the Coeur d'Alene, their rights and property, while Seltice promised that the Coeur d'Alene would defend the flag of the United States.

The following day the commissioners met with the tribe again:

> . . . The chief who had been empowered to speak for the tribe announced that he and his people were ready to sign the agreement. Every man in the council followed, and over two-thirds of the male adults signed the agreement, and it was apparent that all would have done so had they been present.
>
> The agreement was concluded at DeSmet Mission, March 26, 1887.

Under the agreement the Coeur d'Alene Tribe formally ceded its former aboriginal holdings for $150,000.00 and other benefits. They agreed to let

Spokanes settle on the remaining reserve, and they were promised that their reservation would remain in their possession forever (see Appendix VI).[336]

One provision of the agreement prohibited Coeur d'Alene women from marrying white men, unless the agent, chief, and priest all agreed to the man's good character. The same provision gave special rights to four white men who had befriended Chief Seltice. Stephen E. Liberty, Joseph Peavey, Patrick Nixon and Julien Boutellier were permitted to remain on the reservation with their families. The language in the agreement suggested the men had married Coeur d'Alene women, although only two were married to women who were part Native American, and none of the men were married to Coeur d'Alenes. Seltice later said that he had adopted the men and their families into the tribe. This provision was construed by U. S. officials to mean that the four whites and the members of their families should receive per capita shares of the $150,000.00 payment.[337]

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[336] United States. Congress. House. *Reduction of Indian Reservations*. House Executive Document No. 63. 50th Congress, 1st Session. Washington, D. C.: Government Printing Office, 1888. [203]

Dozier, Jack. "Coeur D'Alene Country: the Creation of the Coeur D'Alene Indian Reservation in North Idaho." *Idaho Yesterdays* (1962), p. 4. [63]

United States. Department of the Interior. Commissioners of Indian Affairs. "Annual Report," 1887. Washington, D. C.: Government Printing Office, pp. 29-30 and 287. [298]

[337] Murray, Alberta. *These My Children*. Fairfield, Washington: Ye Galleon Press, 1976, especially pp. 82-83. [182]

One month earlier, during February, 1887, in Washington, D. C., the President signed the General Allotment, or Dawes Act. Under the provisions of this act, individual Indians were to be allotted small parcels of land on which they could establish a family farm. Once allotments to individuals on a particular reservation had been made, the United States could then open the remainder of the reservation to non-Indian purchase, with proceeds going to the tribe.[338] The Dawes Act was used to pressure tribes to assimilate into white culture and to abandon traditional tribal practices. Historians Ross R. Cotroneo and Jack Dozier observed:

> One of the most confusing aspects of federal Indian policy after the enactment of the Dawes legislation was that the government continued to enter into agreements with various tribes whereby supposedly permanent reservations were established for the Indians.

So it was with the promises made in the "treaties" of 1887 and 1889. Cotroneo and Dozier concluded, "one cannot help but question the honesty and intelligence of such a vacillating program"[339] After the passage of the Dawes Act, the Commissioner quickly wrote to the Colville Agent, suggesting that since the Coeur d'Alene were so civilized, shouldn't they quickly be allotted. Moore

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[338] Tyler, S. Lyman. *A History of Indian Policy.* Washington, D. C.: United States Department of the Interior, 1973, pp. 95-98. [182]

[339] Cotroneo, Ross R. and Jack Dozier. "A Time of Disintegration: the Coeur D'Alene and the Dawes Act." *Western Historical Quarterly* Vol. V, No. 4 (October 1974): pp. 405-419. [42]

responded on April 13, saying that "it would cause much dissatisfaction among them" as it would not allow them to continue to farm in the manner in which they were engaged.[340] Later in the year, the Agent held a "full and well attended council with the Indians in regard to taking their lands in severalty and they voted unanimously not to take their lands otherwise than they now hold them." Gwydir argued that in a way they already held their lands in severalty, as each family had a farm of from forty to two hundred acres."[341]

The 1887 Commissioners were undoubtedly honest in their desire to protect Coeur d'Alene rights to their reservation, "forever." However, pressures from other whites to open the reservation, or at least a portion of it, were growing daily. Reports of trespass on the reservation, for the purpose of obtaining tribal timber, and for other reasons, continued throughout 1887. There were new reports of minerals being discovered on the northern portion of the reserve, and requests by whites to mine

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[340] Moore to Atkins, April 13, 1887, Letters Received, Record Group 75, National Archives. [458]

Atkins to Moore, March 18, 1887, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [459]

Atkins to Gwydir, June 4, 1887, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [460]

[341] Gwydir to Commissioner, August 19, 1887, Letters Received, Record Group 75, National Archives. [461]

and prospect on the reservation.[342] The Resident Farmer said that miners were on the reservation, and the Agent concurred, saying "if not stopped at once, the numbers will be so great, that it will be very troublesome to remove them," and asking for troops to help by rendering assistance.[343] The Coeur d'Alene Reservation Resident Farmer reported on May 4, 1887, that a large party of whites had entered the Reservation in the Wolf Lodge area for the purpose of mining. He traveled by launch to the area and ordered the several parties to leave. There were some thirty white men on the reservation engaged in mining. He reported that he believed that he should go there again, accompanied by some Coeur d'Alene men and stay long enough to see them all ejected from the reservation, but he was unwilling to expend the necessary funds until he knew the money would be reimbursed.

> General Carlin the Commanding Officer at Fort Sherman agrees with me that *immediate* action is necessary, or the country will be so full of men that there will be another Black Hills. In fact I am reliably informed that these men have made their boast that I could not keep them off & that

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[342] Cook, Gleason and Harrington to Secretary Lamar, April 30, 1887, Letters Received, Record Group 75, National Archives. [462]

Bischoff, William N. "The Coeur D'Alene Country, 1805-1892." In *Interior Salish and Eastern Washington Indians I.* New York: Garland Publishing Inc., 1974, pp. 265-266. [16]

[343] Gwydir to Atkins, May 14, 1887, Letters Received, Record Group 75, National Archives. [463]

Gwydir to Atkins, telegram, May 14, 1887, Letters Received, Record Group 75, National Archives. [464]

> Government would not back me up in my efforts to remove them . . .

He continued that these men "would not hesitate to shoot an Indian out of pure meanness expecting by this means to gain their ends." He asks that General Carlin supply him with boats and funds to take two or three Indians with him to help eject the miners. Carlin expressed "great interest" in this, said the Resident Farmer, but could do nothing without authority.[344]

The problems with trespass on the reservation became so serious that they were brought before the Secretary of War in May. Agent Gwydir reported miners on the reserve on May 13. The Commissioner referred the matter to the Secretary of the Interior on May 14. The Secretary of the Interior wrote to the Secretary of War, saying there were reports of miners intruding on the Coeur d'Alene Reservation and instructions should be issued for the military to investigate and help expel the intruders. The Secretary of War concurred and issued orders on May 18, 1887. The Commanding Officer of Fort Sherman was issued orders to evict trespassing miners. On July 2, 1887, the Commissioner of Indian Affairs passed along another report, this one from a special inspector, who reported that whites were encroaching on the reserve, and that the Commanding Officer of Fort Sherman was anxious to do his duty, if so ordered. Armstrong said that the Coeur d'Alenes were advanced as farmers, having farmed since 1879, had their own police

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[344] Resident Farmer to Moore, May 4, 1887, Letters Received, Record Group 75, National Archives. Emphasis in original. [465]

force, and should be protected from trespassers. The Commissioner again referred the matter to the Secretary of War. Colonel Carlin received the orders and toured the northern strip of the reservation. Carlin was unwilling to expel the miners, and used, as an excuse, claims that the northern boundary of the reservation was incorrectly surveyed. He reported that the survey that was made in 1883 did not conform to the Executive Order language and as a result a strip of land was left in the reservation. He stated the white miners' claims that it should be opened to the public. Most of the lake, however, was still part of the reservation, he said, and should be obtained from the Indians. On August 15, 1887, Carlin stated:

> . . . Excursion trains are now run from Spokane Falls every Sunday to Coeur d'Alene City, and the excursionists come expressly to indulge in fishing and boating and to view the beautiful scenery along the shores. As steamboats have some years been carrying passengers and freights on the lake and river, and as this business must increase rapidly for many years it must be apparent to the Government that some provision must be made by which the white people can enjoy at least a portion of the lake shore and its waters for pleasure as well as business. The lands on the Eastern shore are utterly useless to the Indians, who do not want it, and are ready, perhaps anxious, to part with it. To the whites this region will be of the greatest value and will be developed, in a short time, to the benefit of the public at large. Though not called on to report on this particular subject, I trust my remarks will not be deemed out of place.

Carlin, nevertheless, was instructed to remove any trespassers, under the specific orders of the Secretary of War. Attached to the file on this matter were the 1883 survey notes of the original surveyor, Darius F. Baker, who described his reasons for making the line as he did, from the northwest corner of the Mission property, rather than from the southwest corner, as the whites would have liked to see it drawn. He described drawing the lines in the lake, and establishing their location by calculation from the banks. Lines frequently were mentioned to be in locations where the river or lake overflowed on occasion. Carlin took a copy of the fieldnotes and had one of his men, trained in surveying, show the difference between where the reservation boundary was and where he thought it should be. In either case, the line was shown crossing the lake and river waters. Carlin then forwarded this map and correspondence to the War Department, hoping for action.[345]

Despite direct orders from the Secretary of War, Carlin continued to resist engaging his troops in the removal

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[345] Trespassing on Coeur d'Alene Reservation, File 2889, Letters Received by the Office of the Adjutant General (Main Series) 1881-1889, Microfilm Roll 533, Record Group 75, National Archives. [466]

Secretary of War to Secretary of the Interior, May 18, 1887, Letters Received, Record Group 75, National Archives. [467]

Secretary of War to Indian Office, July 14, 1887, Letters Received, Record Group 75, National Archives. [468]

Atkins to Gwydir, June 1, 1887, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [469]

of whites from the reserve, arguing that the north boundary was not clear. He had one of his men draw a new line on a map, showing where the whites would like the reservation boundary to be in order to allow their workings. He then submitted this map and his argument to the Adjutant General's office.[346] The Secretary of War relented and reported to the Secretary of the Interior that the War Department could not be used to eject whites until Carlin's request for an accurate map was met.[347] The Interior Department then also relented. Acting Commissioner of Indian Affairs A. B. Upshaw wrote to the Secretary of the Interior on October 24, 1887, concurring with Colonel Carlin that a new survey should be made of the reservation.[348] Colville Agent Rickard Gwydir, under directions from the Commissioner, had investigated the boundary lines of the reservation and concluded that no monuments marked the lines. There was "considerable dissatisfaction" about the matter and the Agency Farmer said the line was never surveyed correctly. It was impossible to keep whites out of the Wolf Lodge area as a

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[346] Carlin to Asst. Adj. General, August 1, 1887, with map, Letters Received, Record Group 75, National Archives. [470]

Straughan to Sparks, August 10, 1887, Letters Received, Record Group 75, National Archives. [471]

Straughan to Carlin at Fort Sherman, August 10, 1887, Letters Received, Record Group 75, National Archives. [472]

[347] Secretary of War to Secretary of the Interior, September 10, 1887, Letters Received, Record Group 75, National Archives. [473]

[348] Acting Commissioner of Indian Affairs A. B. Upshaw to Secretary of the Interior, October 24, 1887, Letters Received, Record Group 75, National Archives. [474]

result, and the Commander of Fort Sherman (formerly Fort Coeur d'Alene) said while it was his duty to drive off trespassers, it was not his duty to keep a garrison at Wolf Lodge. Before the snow should fly that winter, Gwydir said he wanted a new line drawn from Fort Sherman to the Old Mission and thence south.[349] The Commissioner agreed that the north boundary could be changed to reflect the boundary suggested by Col. Carlin and submitted a report to that effect to the Secretary of the Interior.[350]

Although the north boundary line of the reservation was being contested, the correspondence on this affair, and the accompanying maps, indicate that all agreed that the area within the exterior boundaries of the reservation included the lake and river beds, as demonstrated on maps showing the line surveyed down the middle of the Spokane River channel. Both the 1884 and the 1887 maps clearly showed the reservation line carefully plotted going down the center of the Spokane River channel. The 1884 map even includes a statement written on the map

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[349] Gwydir to Atkins, October 27, 1887, Letters Received, Record Group 75, National Archives. [475]

[350] Commissioner Sparks to Secretary of Interior L. Q. C. Lamar, November 11, 1887, and attached maps, Letters Received, Record Group 75, National Archives. [476]

Commissioner Sparks to Secretary Lamar, November 11, 1887, Letters Received, Record Group 75, National Archives. [477]

pointing out that the line went down the "Center of the Channel of the Spokane River."[351]

Officials at the Interior Department, including the Secretary and the Commissioner of Indian Affairs, were well aware that the northern reservation boundary line was already fixed and that tribal consent and an act of Congress would be necessary to change it. The mining activity on the reservation and the War Department's refusal to evict trespassers meant something would have to be done. Seltice concurred that a boundary line had to be firmly established and marked properly, but the Agent pointed out that some Indians would lose improvements if the north line was simply redrawn.[352] A letter from the Commanding Officer of Fort Sherman indicated both the tribe and the United States were considering the tribal ownership of the lake. In December, 1887, Colonel William P. Carlin made a suggestion that would solve the whites' problems and would have far-reaching impacts

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[351] Commissioner Sparks to Secretary of Interior L. Q. C. Lamar, November 11, 1887, and attached maps, Letters Received, Record Group 75, National Archives. [476]

[352] Atkins to Gwydir, September 29, 1887, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [502]

Upshaw to Gwydir, August 9, 1887, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [478]

Atkins to Gwydir, December 15, 1887, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [479]

on the Coeur d'Alenes. He wrote to the Commissioner recommending a change in the reservation boundaries.[353]

> Referring to the matter of the boundary line of the Coeur d'Alene Indian Reservation in Idaho Territory, I respectfully recommend that by Executive and Congressional action combined the lines be changed as follows: That the south east side of the Reservation running from the initial point to the Old Mission on Coeur d'Alene River shall stop at the middle of said river and follow down the channel of the same to its mouth and thence westwardly in a direct line to the middle of Coeur d'Alene Lake, and thence down the middle of said lake to the middle of Spokane River where said River leaves said lake, and thence following the lines described in the Executive order setting apart said Reservation.
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> This change of the boundary between the Old Mission and the head of Spokane River would throw open to the public a part of the Lake for purposes of navigation and pleasure. It would also throw open to the public the tract of land lying between Coeur d'Alene River and the Lake which is known to be valuable for its minerals but nearly worthless for agriculture. The bottom lands along the river are valuable as hay land but useless for cultivation, being overflown

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[353] Col. William P. Carlin to Commissioner of Indian Affairs, December 19, 1887, Letters Received, Record Group 75, National Archives. [480]

Anon. *The Great Northwest: A Guide-Book and Itinerary for the use of Tourists and Travelers over the lines of the Northern Pacific Railroad* . . . St. Paul: Riley Brothers, 1886, p. 305, also noted that the tribe used the river bottom lands to grow hay. [3]

> every year til July. A map is here in the Asst. Commissioner's office which illustrates the lines as I think they should be, and as they are now. Ultimately I have no doubt it will be necessary to procure from the Indians all the land lying between the Coeur d'Alene and Point Joseph Rivers in order that the mineral resources thereof may be developed. The reduction recommended herein is estimated at from forty to fifty thousand acres.

Throughout 1887 and early 1888 pressures on the Coeur d'Alene Reserve built. As nearly forty Spokane families prepared to move to the reservation, whites pestered their Congressmen about opening the reservation to non-Indian use, and the Congressmen and Senators, in turn, questioned Interior Department officials about the validity of Coeur d'Alene title to their reservation.[354] Tribal members had industriously attempted to make money cutting wood for the steamers and railroads. Steamers had been asking formal permission to land and

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[354] Cockrell to Atkins, February 24, 1887, Letters Received, Record Group 75, National Archives. [481]

B. Henley (House of Reps.) to Indian Office, February 1, 1887, Register of Letters Received (entry of February 2, 1887) Record Group 75, National Archives. [482]

Cockrell to Atkins, April 4, 1887, Letters Received, Record Group 75, National Archives. [483]

Saltice to Wright, *et. al.*, April 2, 1887, Letters Received, Record Group 75, National Archives. [484]

Wright, *et. al.* to Atkins, April 13, 1887, Letters Received, Record Group 75, National Archives. [485]

Magnuson, Richard G. *Coeur D'Alene Diary; the First Ten Years of Hardrock Mining in North Idaho,* 1968, p. 47. [109]

buy wood since 1884. Whites were angered that the Coeur d'Alenes charged them for wood that was cut on the reserve, for grazing, and for easement rights; and that they required permits to conduct business on reservation land or water.[355] Powerful railroad interests were

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[355] George Harvey, License to Trade at Coeur d'Alene, January 25, 1887, Letters Received, Record Group 75, National Archives. [486]

Note to file, June 18, 1887, Letters Received, Record Group 75, National Archives. [487]

Nelson Martin to Secretary of the Interior, June 27, 1887, telegram, Letters Received, Record Group 75, National Archives. [487]

Moore to Atkins, January 28, 1887, Letters Received, Record Group 75, National Archives. [488]

King to Acting Commissioner, June 2, 1887, Letters Received, Record Group 75, National Archives. [489]

Moore to Atkins, January 28, 1887, Letters Received, Record Group 75, National Archives. [490]

Secretary of the Interior to Commissioner, September 13, 1887, Letters Received, Record Group 75, National Archives. [491]

Rickard D. Gwydir to J. D. C. Atkins, November 22, 1887, Letters Received, Record Group 75, National Archives. [492]

Atkins to Gwydir, July 8, 1887, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [493]

Hawkins to Moore, May 6, 1887, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [494]

Lamar to Commissioner, June 30, 1887, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [495]

attempting to build lines across reservation land, and were sometimes frustrated with tribal restraint and reticence at providing right-of-ways.[356] Seltice and a

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King to Hawkins, June 2, 1887, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [496]

Atkins to Moore, January, 19, 1887, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [497]

Bischoff, William N. "The Coeur D'Alene Country, 1805-1892." In *Interior Salish and Eastern Washington Indians I.* New York: Garland Publishing Inc., 1974, pp. 263-267. [16]

[356] Diomedi, Alexander. *Sketches of Indian Life in the Pacific Northwest.* Fairfield, Washington: Ye Galleon Press, 1978 (originally published 1902), p. 28. [60]

Wood, John V. *Railroads Through the Coeur D'Alenes.* Caldwell, Idaho: The Caxton Printers, Ltd., 1984, pp. 27-33. [290]

United States. Congress. *Congressional Record.* 49th Congress, 2nd Session, pp. 272, 305, 502, 825, 1203, 1244, 1565, 1576-1577, 1682, 1736, 1974, 2729-2731. Washington, D. C.: Government Printing Office, 1886-1887. [186]

United States. Congress. *Congressional Record.* 50th Congress, 1st Session. Washington, D. C.: Government Printing Office, 1887-1888, p. 19. [187]

United States. Congress. House. *Washington and Idaho Railroad Company.* Report No. 4133. 49th Congress 2d Session. Washington, D. C.: Government Printing Office, 1887. [201]

United States. Congress. House. *Spokane and Palouse Railway Company.* Report No. 4134. 49th Congress, 2d Session. Washington, D. C.: Government Printing Office, 1887. [202]

United States. Congress. House. *Spokane and Palouse Railway Company.* Report No. 3836. 49th Congress, 2d Session. Washington, D. C.: Government Printing Office, 1887. [200]

delegation of Coeur d'Alenes visited Washington at the expense of railroad interests. Although government officials were pleased with the Coeur d'Alenes, and flattered them, on his return to the reservation, Seltice reported that whites were scouring the reservation for gold and openly laughing at the Indians. Agent Gwydir reported that whites would use the "slightest opportunity to get on the Reserve, and after they get a foothold it will be a hard matter to dislodge them."[357] John Mullan became so concerned that he wrote to the Secretary of the Interior, saying that he had been informed there were efforts in Congress to open the Coeur d'Alene Reservation to whites. He made a formal request to the Secretary to be heard on the matter before any such decision was made.[358]

Feathers, Joseph J. S. *These Are the Coeur D'Alene Tribe.* Lewiston, Idaho: Lewis-Clark State College Press, 1971, p. 8. [68]

Harms, Su, ed. *The Coeur D'Alene Teepee* Vols. I-III (1937-1940) (July 1980). Plummer, Idaho: Serento Press, p. 294. [79]

"The Diary of DeSmet Mission, Idaho from 1878 to 193(9)," Box 730, House Diaries, 1878-1944, Gonzaga University. Oregon Province Archives of the Society of Jesus, Spokane, Washington. [498]

[357] Gwydir to Atkins, June 24, 1887, Letters Received, Record Group 75, National Archives. [499]

Saltese *et. al.* to Asst. Commissioner Upshaw, August 16, 1887, Letters Received, Record Group 75, National Archives. [500]

[358] Mullan to Lamar, February 18, 1887, Letters Received, Record Group 75, National Archives. [501]

The priests on the reserve were concerned that any conflict would be harmful to the tribes' chances to negotiate a satisfactory agreement, so they discouraged any activities that might result in a confrontation. One Coeur d'Alene man was persuaded not to finish constructing a canoe, as the priests worried he might encounter whites on the river who would confront him.[359]

In 1887 the tribe had finally achieved their goal of negotiating a treaty to obtain payment for their aboriginal lands, a treaty which also provided them with a promise that their reservation would never be taken from them. During 1886 and 1887 officials of the United States government at the very highest levels had again concluded that the reservation included Lake Coeur d'Alene, the Coeur d'Alene River and the St. Joe River, that those bodies of water were subject to Indian laws and regulations, and that they were held in trust by the United States for the tribe. But pressures on the resources, particularly in the northern portion of the reservation, became so great that there was a growing effort to force Congress to take some action that would result in the opening of all or a portion of the reservation. Officials in the War Department believed that the United States should negotiate to obtain a portion of Lake Coeur d'Alene and the Coeur d'Alene River so that whites could use the waters for business and pleasure.

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[359] Rossi, Jeremiah. "Rocky Mountains." *Woodstock Letters*, Vol. 17 No. 1 (1887): pp. 73-81. [654]

XII Another Agreement to Cede Territory, 1888-1889

Problems with trespass, railroads and timber only increased in 1888. A blizzard of paper was generated as the railroads (and now the Coeur d'Alenes) attempted to obtain easements across the reservation to the mining district, and the mineral deposits which were now thought to be "practically inexhaustible."[360] The tribe believed that access to the railroad would help them to

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[360] Upshaw to Gwydir, June 9, 1888, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [503]

Upshaw to Gwydir, July 25, 1888, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [504]

Secretary to Gwydir, October 1, 1888, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [505]

Commissioner to Gwydir, December 8, 1888, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [506]

United States. Department of the Interior. Commissioners of Indian Affairs. "Annual Report," 1888. Washington, D. C.: Government Printing Office, pp. 223 and 323-324. [249]

United States. Congress. House. *Washington and Idaho Railroad Company.* Report No. 1713. 50th Congress, 1st Session. Washington, D. C.: Government Printing Office, 1888. [204]

Kappler, Charles Joseph. *Indian Affairs, Laws and Treaties,* Vol. 1. Washington, D. C.: Government Printing Office, 1904, p. 272. [99]

United States. Department of the Interior. General Land Office. "Report of the Commissioner of the General Land-Office for the Year 1888," 1888. Washington, D. C.: Government Printing Office, p. 446. [271]

market their products to non-Indians in the region. Settlers continued to pester officials, trying to determine some way to wrest Indian lands from the tribe.[361] Again in 1888 the Commissioner wired the Agent to order the eviction of trespassers on the reserve.[362] In August, the Resident Farmer, F. Holmes, reported to Gwydir on the work he had done over the past two years in evicting trespassers. Holmes told Gwydir on August 14, 1888, that during the months of June, July and August, 1888, he had "removed from the Coeur d'Alene Lake & its tributary waters one hundred and fourteen (114) persons."

> These persons were engaged in camping & fishing & as some one unknown had used Giant Powder to kill fish I removed all I found.

He also removed people coming on the reservation to cut timber. In the past two years he reported he had removed three hundred trespassers, "engaged in mining, haycutting, timber stealing, sheep herding, & fishing" (see Map 15). He had been testifying against these people and trying to gain indictments and punishment for them, as

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[361] Palmer to Atkins, January 16, 1888, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [507]

Atkins to Gwydir, March 26, 1888, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [508]

[362] Commissioner to Gwydir, April 19, 1888, telegram, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [509]

well.[363] Within a week Agent Gwydir was informed that funds to pay for the Resident Farmer were being withdrawn. Gwydir responded that the presence of the farmer there was of the utmost importance. He said "the whites in the country about the Reserve are continually encroaching upon the Indians and committing depredations," and that the tribe needed the white farmer there to support their efforts to keep trespassers of [sic] the reservation and to help them improve their farming practices.[364]

The Coeur d'Alenes' ability to fish their native streams was eliminated in much of the Coeur d'Alene River drainage by 1888. A local newspaper reported in 1888 that the mining operations had significantly damaged the fisheries.[365]

> By the fall of 1888, both the Tiger and Poorman mills were operating sufficiently to have colored Canyon Creek to its mouth, and no more trout were ever caught there.

Another author, May Arkwright Hutton, who witnessed the gold rush and its impacts on the environment, recalled the changes.[366]

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[363] F. Holmes, Resident Farmer to Gwydir, August 14, 1888, Letters Received, Record Group 75, National Archives. [510]

[364] Gwydir to Commissioner, August 28, 1888, Letters Received, Record Group 75, National Archives. [511]

[365] Livingston-Little, D. E. *An Economic History of North Idaho, 1800-1900.* Journal of the West: Lorrin L. Morrison and Carroll Spear Morrison Publishers, 1965 p. 90. [108]

[366] Hutton, May Arkwright. "The Coeur D'Alenes: a Tale of the Modern Inquisition in Idaho." in *Liberated Woman: a Life of May Arkwright Hutton.* Montgomery, James W. (ed.), Fairfield, Washington: Ye Galleon Press, 1974, p. 156. [89]

> Its rivers formerly abounded in fish and its forests were stocked with deer, bear and a variety of small fur-bearing animals, but the advent of the white man and the march of civilization has changed all this. . . .
>
> No more the wild-eyed antelope graze on the mountain slopes. The streams are no longer a sparkling crystal – the concentrates from the mills of the great silver and lead mines of the Coeur d'Alenes have changed them so they resemble the Chicago River, and the beautiful speckled trout live no more therein.

There was some movement in Congress to ratify the 1887 agreement,[367] but by the end of 1888 it was clear the agreement would not be ratified until additional negotiations were carried out with the tribe. A House Report concluded that the 1887 agreement was not ratified by the 50th Congress, for "sundry reasons, among which was a desire on the part of the United States to acquire an additional area, to wit, a certain valuable portion of the reservation specially dedicated to the exclusive use of said Indians under an Executive order of 1873 . . . "[368]

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[367] Atkins to Gwydir, January 10, 1888, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [512]

United States. Congress. *Congressional Record*. 50th Congress, 1st Session, pp. 7153, 8643, 8754-8755, 8892. Washington, D. C.: Government Printing Office, 1888. [188]

[368] United States. Congress. House. *Ratification of Coeur D'Alene Indian Treaties in Idaho*. Report No. 1109. 51st Congress, 1st Session. Washington, D. C.: Government Printing Office, 1890. [206]

> It contains a magnificent sheet of water, the Coeur d'Alene Lake, and its chief tributary, to wit, the Coeur d'Alene River, over the waters of which steamers now ply daily from the city of Coeur d'Alene to the old Coeur d'Alene Mission, there connecting with a railway system penetrating into the very heart of said Coeur d'Alene mineral belt. It also controls the outlet of said lake, to wit, the Spokane River.

Whites in the region were frustrated that the Coeur d'Alenes had good title to their reservation, and to Lake Coeur d'Alene and the rivers, thereon. Senator Mitchell of Oregon, no doubt responding to the clamoring calls by whites to open the reserve, submitted a resolution to the Senate, asking for information on the Reservation. Senator Dawes of the Indian Committee responded, on the floor, that all the required information was currently available, but Mitchell persisted and the Senate backed him when it passed a Senate Resolution (see Appendix VII).[369]

> Whereas it is alleged that the present area of the Coeur d'Alene Indian Reservation, in the Territory of Idaho, embraces 480,000 acres of land; that there are, according to the statistics in the Indian Bureau, only about 476 Indians in the tribe now occupying such reservation, or more

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[369] United States. Congress. *Congressional Record*. 50th Congress, 1st Session, pp. 19, 618, 693, 894, 1131, 2290, 2370, 3053, 4165, 4308, 4330, 4910. Washington, D. C.: Government Printing Office, 1887-1888. [187]

United States. Congress. Senate. *Resolution*. Misc. Doc. No. 36. 50th Congress, 1st Session. Washington, D. C.: Government Printing Office, 1888. [214]

than 1,000 acres to each man, woman, and child; that Lake Coeur d'Alene, all the navigable waters of Coeur d'Alene River, and about 20 miles of the navigable part of Saint Joseph River, and part of Saint Mary's, a navigable tributary of the Saint Joseph, are embraced within this reservation, except a short-line of about 3½ miles at the north end of the lake, it being alleged that this lake and its rivers tributary constitute the most important highways of commerce in the Territory of Idaho, and are in fact the only navigable waters, except Snake River, now used for steam-boat; navigation in the Territory; that all boats now entering such waters are subject to the laws governing the Indian country and all persons going on such lake or waters within the reservation lines are trespassers; and

Whereas it is further alleged that the Indians now on such reservation are located in the extreme southwest corner of the same around De Smedt [sic] Mission, near the town of Farmington, in Washington Territory, where the land is good for agriculture; and it being further alleged that all that part of such reservation lying between Lake Coeur d'Alene and Coeur d'Alene River and that part between the Coeur d'Alene River and Saint Joseph River is a territory rich in the precious metals and at the same time being of no real use or benefit to the Indians: Therefore,

Resolved, That the Secretary of the Interior be, and he is hereby, directed to inform the Senate as to the extent of the present area and boundaries of the Coeur d'Alene Indian Reservation in the Territory of Idaho; whether such

> area includes any portion, and if so, about how much of the navigable waters of Lake Coeur d'Alene, and of Coeur d'Alene and St. Joseph Rivers; about what proportion of said reservation is agricultural, grazing, and mineral land respectively; also the number of Indians occupying such reservation; also on what portion of such reservation the Indians now thereon are located; also whether, in the opinion of the Secretary, it is advisable to throw any portion of such reservation open to occupation and settlement under the mineral laws of the United States, and, if so, precisely what portion; and also whether it is advisable to release any of the navigable waters aforesaid from the limits of such reservation.

The resolution stated what the Senate believed to be true about the situation, and asked that the Secretary confirm or deny the relationship of the tribe and the United States to the rivers and lake within the reservation. This resolution of inquiry from the Senate of the United States to the Secretary of the Interior, and the subsequent reply from the Secretary, established beyond any doubt the ownership of Lake Coeur d'Alene, the St. Joe River, and the Coeur d'Alene River and their river and lake beds. The Senate indicated that all boats that enter upon the waters of the lake and rivers inside the exterior boundaries of the reservation are subject to "the laws governing Indian country" and that "all persons going on such lake or waters within the reservation lines are trespassers." The Senate asked the Secretary "whether it is advisable to release any of the navigable waters aforesaid from the limits of such reservation," further establishing that the United States regarded those waters

within the reservation's exterior boundaries to be a part of the reservation.

A short while later the Secretary of the Interior made his formal response.[370] The Secretary of the Interior referred the resolution of inquiry to the Commissioner of Indian Affairs, J. D. C. Atkins, who provided the formal response. The Secretary, in his introduction to the report, indicated that Lake Coeur d'Alene, and a portion of both the Coeur d'Alene River and the St. Joe River were within the reservation (although it was unclear how much of the St. Joe River was navigable).

> The Commissioner further states that, in his opinion, the reservation might be materially diminished without detriment to the Indians, and that changes could be made in the boundaries for the release of some or all of the navigable waters therefrom which would be of very great benefit to the public; but this should be done, if done at all, with the full and free consent of the Indians, and they should, of course, receive proper compensation for any lands so taken.

The Secretary also referred to the recent agreement with the tribe, in which the tribe officially ceded their former lands outside the current reservation. The Secretary noted that the Commissioner said in his report that this agreement should be ratified before negotiating with the Coeur

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[370] United States. Congress. Senate. *Letter from the Secretary of the Interior . . . about the Coeur D'Alene Indian Reservation*. Ex. Doc. No. 76. 50th Congress, 1st Session. Washington, D. C.: Government Printing Office, 1888. [213]

d'Alenes for "the cession of such portions of their reservation as they do not need, including all or a portion of the navigable waters . . . "

Commissioner Atkins began his letter to the President Pro Tempore of the Senate by quoting the entire resolution of January 25. In his comments to the Senate he made it abundantly clear that the United States considered Lake Coeur d'Alene, and those portions of the Coeur d'Alene River and the St. Joe River that were within the exterior boundaries of the Coeur d'Alene Reservation to be a part of the Coeur d'Alene Tribe's holdings, and that the tribe held "all the original Indian rights in the soil they occupy." He expressly indicated the United States' official determination that the navigable waters within the reservation were held by the tribe and that the tribe's consent was necessary to obtain a cession of part or all of them. He concluded that if the 1887 agreement was ratified, a cession of all or part of those waters could be arranged, so long as it was fair and included reasonable terms (see Map 14).

The content of the Senate Resolution, the Secretary of the Interior's response, and the Commissioner of Indian Affairs' response leave no doubt as to the rights of the Coeur d'Alenes to Lake Coeur d'Alene, and the portions of the St. Joe River and the Coeur d'Alene River within their 1873 Executive Order Reservation.

The Commissioner reported that the reservation contained almost 600,000 acres and described the landscape there.

> From the official map of Idaho (1883) and sundry others examined, the reservation appears to

> embrace all the navigable waters of Lake Coeur d'Alene, except a very small fragment cut off by the north boundary of the reservation which runs "in a direct line" from the Coeur d'Alene Mission to the head of Spokane River.

He described the shape and size of the lake and noted that the lake was navigable over its entire length, the Coeur d'Alene River was navigable over all the portion within the reservation, and that although he lacked sufficient information to make the conclusion, the St. Joe appeared to be large enough to be navigable. He provided a summary of agricultural, grazing and timber portions of the reservation, and said he enclosed a map with this report, which clearly described aspects of the riverbeds.

> A strip one-half mile wide on both sides of the Coeur d'Alene River along its entire length is described as "fertile valley, overflowed every spring."

He referred to the map made in 1886 by the officer who investigated "the sale of liquor upon the steamer *Coeur d'Alene* within the navigable waters of the reservation . . . ," and said this was submitted also.

> The question which remains to be answered is, whether it is advisable to throw any portion of the said reservation open to occupation and settlement under the mineral laws of the United States and, if so, precisely what portion, and whether it is desirable to release any of the navigable waters mentioned in the resolution from the limits of said reservation.

In approaching the question, the Commissioner described the "virtues, habits of industry, loyalty, and ambition" of

the Coeur d'Alenes. He quoted the Northwest Indian Commission's report and referred to the tribe's help during the Nez Perce War, then noted the mining rush to the area and the manner in which it threatened their lands. He quoted from recent agents' reports, which indicated the tribe's great concerns about losing their reservation lands to whites, and about the whites' efforts to have the reservation thrown open. The Commissioner concluded:

> I have taken some pains to ascertain, by reference to the correspondence and otherwise, whether the Indians would be likely to consent to a reasonable reduction of their reservation, and I am satisfied that they would upon anything like just and reasonable terms, and my own opinion is that the reservation might be materially diminished without detriment to the Indians, and that changes could be made in the boundaries for the release of some or all of the navigable waters therefrom, which would be of very great benefit to the public; but this should be done, if done at all, with the full and free consent of the Indians, and they should, of course, receive proper compensation for any land so taken.
>
> Just what portion of the reservation and navigable waters should be segregated from the reservation, I am unable to say. That, I think, should be determined by negotiations with the Indians.

The Commissioner then quoted from two reports suggesting that whites wanted the northeastern side of the reserve, known as the Wolf Lodge District. The Commissioner also noted that the Indians were against allotment, having much more land under cultivation already, than they would be allowed to select under the Dawes Act.

The Indians had, in fact, voted unanimously to reject taking lands in severalty.

> In conclusion I will state that in my opinion these Indians have all the original Indian rights in the soil they occupy. They claimed the country long before the lines of the reservation were defined by the executive order of 1873, and the present reservation embraces only a portion of the lands to which they laid claim. This claim has been recognized in various ways and at sundry times . . .

He then cited the 1887 agreement, and noted the pending removal of 350 to 400 Spokanes to the Coeur d'Alene Reservation.

> I think that when the present agreement shall have been ratified it will be an easy matter to negotiate with them for the cession of such portions of their reservation as they do not need, including all or a portion of the navigable waters, upon fair and very reasonable terms.

On July 13, 1888, Senator Mitchell introduced a bill (S. 3326) which would authorize the Secretary of the Interior to "negotiate with the Coeur d'Alene tribe of Indians for the purchase and release of a portion of their reservation."[371] Although Mitchell's bill did not pass in 1888, wheels had now begun to turn, and momentum now was building to enable legislation that would allow United States negotiations with the Coeur d'Alenes for

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[371] United States. Congress. *Congressional Record.* 50th Congress, 1st Session, pp. 19, 618, 693, 894, 1131, 2290, 2370, 3053, 4165, 4308, 4330, 4910, and 6227. Washington, D. C.: Government Printing Office, 1887-1888. [187]

the purchase of a portion of Lake Coeur d'Alene and the Coeur d'Alene River. On the reservation, in 1888, the tribe suffered from an epidemic of scarlet fever and measles, but a physician there segregated the sick and the Coeur d'Alene did not suffer results as bad as those suffered by other neighboring tribes.[372] Although there had been complaints about school cleanliness, the Jesuit schools were reported to be highly successful. It was reported that by the year 1888 more than half of the Coeur d'Alenes could understand English and one hundred twenty-five could read.[373] By 1889 nearly all of the essential means of transportation and communication had been established in the Coeur d'Alene area (see Map 16).[374]

> Railroads reached into every producing nook, roads were rough but wagons were strong and horses plentiful, telephone and telegraph lines tied together the remote settlements and linked all with the world at large.

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[372] Peltier, Jerome. *A Brief History of the Coeur D'Alene Indians, 1806-1909.* Fairfield, Washington: Ye Galleon Press, 1981, pp. 58-59. [132]

[373] Peltier, Jerome. *A Brief History of the Coeur D'Alene Indians, 1806-1909.* Fairfield, Washington: Ye Galleon Press, 1981, pp. 59 and 62, who later says thirty-six spoke English, in any case a large number of the tribe could converse in English at the time. [132]

[374] Bischoff, William N. "The Coeur D'Alene Country, 1805-1892." In *Interior Salish and Eastern Washington Indians I.* New York: Garland Publishing Inc., 1974, p. 257. [16]

Steamers had the capability of hauling more than 1,300 tons a week by the beginning of 1889.[375] Congress had failed again in 1888 to ratify the 1887 agreement, and the only excuse ever "tendered was that the United States wanted to acquire a certain valuable portion of land in the northern reaches of the reservation."[376]

On March 2, 1889, Congress passed the annual Indian Appropriations Act, which included a provision to create a Coeur d'Alene Commission.[377]

> That the Secretary of the Interior be, and he is hereby, authorized and directed to negotiate with the Coeur d'Alene tribe of Indians for the purchase and release by said tribe of such portions of its reservation not agricultural, and valuable chiefly for minerals and timber, as such tribe shall consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and for the purpose of such negotiation the sum of $2,000, or so much thereof as may be necessary, is hereby appropriated out of any money in the Treasury not otherwise appropriated; the action of the Secretary of the Interior hereunder to be

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[375] Magnuson, Richard G. *Coeur D'Alene Diary; the First Ten Years of Hardrock Mining in North Idaho*, 1968, p. 59. [109]

[376] Dozier, Jack. "Coeur D'Alene Country: the Creation of the Coeur D'Alene Indian Reservation in North Idaho." *Idaho Yesterdays* (1962), p. 5. [63]

[377] United States. Congress. Senate. *A Letter of the Secretary of the Interior Relative to the Purchase of a Part of the Coeur D'Alene Reservation*. Ex. Doc. No. 14. 51st Congress, 1st Session. Washington, D. C.: Government Printing Office, 1889. [215]

> reported to Congress as the earliest practicable time.

The Commission, composed of Benjamin Simpson of Selma, Alabama; John H. Shupe of Oakland, Oregon; and Napoleon B. Humphrey of Albany, Oregon, was appointed in May, 1889. In the meantime, during the early months of 1889 friction at Coeur d'Alene continued to build. Both the Spokanes and the Coeur d'Alenes were upset that Congress had failed to ratify the 1887 agreement.[378] Seltice, Regis and Peter Wildshoe, witnessed by Father Cataldo, petitioned newly elected President Harrison on April 30, 1889. They pointed out that they were on good terms with their neighbors and had protected whites from the Nez Perce during the war of 1877. They said that some whites coveted their "small, little reservation left to us," and asked President Harrison to see to it that their 1887 agreement was ratified.

> . . . It seems to us very strange that the great government of Washington should covet a few hundred thousand acres of our land left to us after our giving to said government nearly four millions of acres of very rich and valuable lands and minerals. . . .
>
> We hear that you have appointed some Commissioners to come and treat with us for the purpose of curtailing our reservations, though we

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[378] Seltice, *et. al.*, to President Harrison, April 30, 1889, Letters Received, Record Group 75, National Archives. [513]

Acting Commissioner to Gwydir, April 24, 1889, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [514]

> have no objection to give up some of our mountains, yet we do not see how we can make an agreement before the ratification of the first agreement. Our people will surely say "Washington does not keep his word, and it is useless to treat with him."

Father Cataldo forwarded this letter to John Mullan, who personally delivered this petition to President Harrison on May 28, 1889. The President, in turn, referred the letter to the Secretary of the Interior.[379]

During the same year, settlers continued to complain that they were being denied the rights to minerals that they had discovered on the reservation, and that the reservation lines were not drawn correctly.[380] Trespass continued and in that year included illegal homestead

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[379] Seltice, *et. al.*, to President Harrison, April 30, 1889, Letters Received, Record Group 75, National Archives. [513]

Cataldo to Mullan, May 10, 1889, Letters Received, Record Group 75, National Archives. [515]

Note to File, Executive Mansion, The President, 1889, Letters Received, Record Group 75, National Archives. [516]

[380] Charles Hoffman to Secretary of the Interior, May 4, 1889, Letters Received, Record Group 75, National Archives. [517]

Hobbs to Secretary of the Interior, July 3, 1889, Letters Received, Record Group 75, National Archives. [518]

Hon. J. N. Dolph to Secretary of the Interior, August 11, 1889, Letters Received, Record Group 75, National Archives. [519]

Manderson to Secretary of the Interior, December 4, 1889, Letters Received, Record Group 75, National Archives. [520]

entries on the reservation.[381] Controversy built in 1889 over the improvements of Frederick Post, at Post Falls, which were apparently inside the reservation boundaries.[382] Finally, violence did break out. Resident Farmer Holmes reported on March 20, 1889, that there had been trouble between the Coeur d'Alenes and whites on about January 25th. Whites entered the reservation to obtain wood, but a Coeur d'Alene man, following the directions that the Indian Office had given him, refused to give the whites permission. The whites then severely beat the man. His son arrived with a rifle and fired several shots after the men. The following Saturday the whites went to Farmington looking for Indians. Two of the white men, Joseph Nixon and Lee Stewart attacked a group of Coeur d'Alenes who were eating in a restaurant. Using chairs as weapons they badly beat the Coeur d'Alenes. The whites then followed the Indians to a store where they beat them again with the butts of revolvers, one of which had been borrowed specifically for the occasion of the attack.

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[381] James Ballard, homestead entry, September 17, 1889, Letters Received, Record Group 75, National Archives. [521]

Cole to Commissioner, October 5, 1889, Letters Received, Record Group 75, National Archives. [522]

[382] Note to File, May 31, 1889, Letters Received, Record Group 75, National Archives. [523]

Gwydir to Indian Office, April 5, 1889, Letters Received, Record Group 75, National Archives. [524]

Frederick Post to Indian Office, September 28, 1889, Letters Received, Record Group 75, National Archives. [525]

Acting Commissioner to Cole, September 19, 1889, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [526]

Holmes said he found the inhabitants of the town of Farmington so prejudiced towards the Coeur d'Alenes that he didn't even try to bring charges against them, for he believed the whites would only be acquitted, and he said he feared such an acquittal would "only embolden others to repeat the offence." Holmes hoped that friendly whites should help him seek prosecution of the offenders, but after this incident, Holmes was afraid that "serious trouble was likely to follow from this fight."[383]

Against this backdrop the Coeur d'Alene Commissioners arrived on the Coeur d'Alene Reservation, under very considerable official and unofficial pressure to negotiate a quick cession of Coeur d'Alene territory. The Commission received its instructions on June 13. A month later the Colville Agent was informed of the Commission's proposed task and asked to render them assistance.[384] They arrived at Coeur d'Alene on August 5, obviously on an accelerated schedule. They reported holding frequent councils with the tribe, and examining the reservation in detail before reaching an agreement with the tribe. But their work was not easy.

In the official report describing the 1889 negotiations, the Commissioner of Indian Affairs gave a short history of the tribe's claim to its territory, "based upon original

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[383] Gwydir to Commissioner, May 4, 1889, enclosing Holmes to Gwydir, March 20, 1889, Letters Received, Record Group 75, National Archives. [527]

[384] Morgan to Cole, July 8, 1889, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [528]

possession and occupancy," and of the 1887 agreement. He said:[385]

> When the Commissioners whose work is now under consideration approached the Indians upon the subject of relinquishment of some of their reservation lands, they absolutely refused to entertain any proposition of that kind until the old agreement was ratified.

In the report Commissioner of Indian Affairs T. J. Morgan described the commission's negotiations with the tribe, pointing out that the tribe was not only disturbed that their 1887 agreement had not been ratified, but that the Washington and Idaho Railroad had not paid money that was due the tribe for a right-of-way. The Coeur d'Alenes, said the commission, "displayed surprising business sagacity, coupled with an exalted idea of the fulfillment of promises." Commissioner Morgan had received the money due the tribe in January, but had not

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[385] United States. Congress. Senate. *A Letter of the Secretary of the Interior Relative to the Purchase of a Part of the Coeur D'Alene Reservation*. Ex. Doc. No. 14. 51st Congress, 1st Session. Washington, D. C.: Government Printing Office, 1889, which includes complete transcripts of the following documents. [215]

Commissioner Morgan to Secretary of the Interior, December 7, 1889, Letters Received, Record Group 75, National Archives. [529]

Report of the Coeur d'Alene Indian Commission, September, 1889, Letters Received, Record Group 75, National Archives. [530]

Transcript of Coeur d'Alene Indian Commission Councils with the tribe, 1889, Letters Received, Record Group 75, National Archives. [531]

forwarded it the agent for per capita distribution. He then immediately did so.[386]

The commissioners had only been in DeSmet four days before they were forced to wire the Indian Office. Ben Simpson, Chairman of the Coeur d'Alene Commission telegraphed the Commissioner of Indian Affairs on August 8, 1889, reporting that the Coeur d'Alenes objected to making another agreement until the former treaty was ratified. Simpson asked for authority to insert a clause in the proposed treaty making it invalid until the former treaty was also ratified. With that clause inserted, he said, he thought they could successfully make a new treaty.[387]

The Commissioner of Indian Affairs approved the clause, and pointed out later, in the official report, that a bill to ratify the 1887 agreement had passed the Senate, but failed to reach the floor of the House. He also provided an explanation for a proposed provision of per capita payments.

> It has not been the practice to pay such large sums of money to Indians cash in hand as is

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[386] Receipt, January 25, 1889, Letters Received, Record Group 75, National Archives. [532]

Morgan to Cole, August 5, 1889, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [533]

Morgan to Cole, August 6, 1889, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [534]

[387] Simpson to Commissioner, August 8, 1889, telegram, Letters Received, Record Group 75, National Archives. [535]

> proposed in this case, but the Coeur d'Alene Indians are far advanced in civilization, and from what is known of their habits and past life it would not be unreasonable to assume that they would make just as good use of their money if paid in this way as they would if it were paid to them in smaller sums or expended for their benefit in the usual manner.

He then quoted extensively from the annual report for 1888, which included this statement from the agent in 1888:

> I have said this much in order to show that the Coeur d'Alene Indians are quite intelligent and fully capable of understanding their relations to their white neighbors, and that they would be likely to take a sensible view of any proposition for a change of the boundaries of their reservation which public necessity or convenience would seem to require, and at the same time to show that they are deserving of fair and honest treatment from the whites.

The commissioners themselves filed an extensive report and transcript of proceedings at DeSmet. The Agent, Hal J. Cole met the Commission at DeSmet, where they had arrived on August 5, for the first council meeting on August 14. From the transcripts of councils and correspondence of the commission, it is clear there were additional meetings for which no transcripts were made.

The first council was held on August 14, 1889. General Simpson began by reading the commission's instructions from the Secretary of the Interior, stating that the treaty of 1887 would be ratified, that a clause of the current agreement would reflect a requirement to that

effect, that money due them from the railroad would arrive at once, and explained that "you [the Coeur d'Alene Tribe] are not compelled to sell."

Seltice spoke next, comparing the 1887 agreement to the construction of a fence:

> We built a strong, high fence with the Government; we built it round so the end nearly met. We done our part, but the gap that was left has never been finished by the Government at Washington.

Simpson responded that the President and Secretary of the Interior had endorsed ratification of the 1887 agreement and he was sure it would pass. Seltice was conciliatory and said though his people didn't understand these things as the whites did, and though they could not read and write, they wanted the proper paper to be made – that is they wanted an accurate transcript of the proceedings and the proposed agreement. Seltice asked the commissioners to be patient, granted them permission to look at reservation lands, and provided them with two guides. On the 16th the commission traveled to the mouth of the St. Joe, with an eye to putting a price on the territory they wanted to purchase from the tribe.

> From the St. Joseph River the Commission proceeded by boat to the Old Mission,the extreme northeastern point of the reserve, traversing in their course some eight miles of Coeur d'Alene Lake and thirty miles of Coeur d'Alene River.

The commission toured the mining and timber country, from Coeur d'Alene City to Wolf Lodge country. They concluded that the area around the head of the Spokane River would prove most valuable to whites.

> The timber is good and is easy of access, the Spokane River furnishing good facilities for conveying the logs to points along its course, where the opening of a new and rapidly settling country causes a great demand for lumber.

Then they returned to DeSmet and called a meeting for August 27.

The Commission told the tribe at this second meeting that they had been told to look for territory that the Tribe would not need, including lands that were mainly good for timber and minerals. The commission said it had done so, and now had a proposal to make. Simpson said the normal price for lands was $1.25 an acre, with timber land going for $2.50. Seltice responded that if the price wasn't right they wouldn't sell. Again, the Commission agreed with Seltice, and made the current negotiations contingent on passage of the previous one. Seltice provided another excellent metaphor:

> What was done by the last commission is like cooking a dinner, then setting it to one side to wait; you do not cook a dinner and lay it aside, then cook another dinner before you have eaten the first; it is that way with these treaties.

Then in talking about the proposed cession line and how it would impact travel and navigability, General Simpson said:

> We fixed a line, as was shown you on the map; it is just as Mr. Liberty [the interpreter] explained it to you. You understand that the lake belongs to you as well as to the whites – to all, every one who wants to travel on it.

> SALTISE. That is your idea about the boundary. You know we do not understand papers; in taking it that way we will not know the boundaries.
>
> General SIMPSON. You all know where the St. Joseph River is. We do not want any of that.

General Simpson then read a description of the proposed cession boundaries, including a description of the line drawn through the lake. He then continued.

> Now, if we buy this land you still have the St. Joseph River and the lower part of the lake and all the meadow and agricultural land along the St. Joseph River.

Saltice said he did not like the boundaries, and that his people were "bent" and that they didn't want to discuss a new treaty until the old one was finished. But, he said, if the two sides talked more maybe his people would consent.

Four days later, on August 31, 1889, the group met again. Seltice told the commissioners that as an Indian he had no interest in money. What he was interested in was his land. He reviewed the history of whites that had visited him over the previous forty years and noted that they had also promised him his land would always remain his.

> We are willing to let some go now – that which lays along the northern boundary of our reservation, and from eastern boundary of Coeur d'Alene River, and western boundary of Coeur d'Alene Lake, and south to mouth of Coeur d'Alene River.

His description at this point indicated that he did not know that lands to the west of the lake and north of the river's mouth were to be included in the cession. He went on:

> We are willing to relinquish this regardless of the three other commissioners [previous commissions]. Here you have plenty of timber, plenty of mineral, and plenty of grass; am willing to relinquish all this. I understand well this takes in all of the Wolf Lodge country.

Again at this point his comments suggest that he did not believe that the cession included any of the lake or any of the lands south of the river.

Simpson said, "We want to buy that which you want to sell." Seltice said that there were five or six Coeur d'Alenes who had claims in that area and that the United States needed to settle with them, but Simpson and Shupe told Seltice that the tribe had to make any such settlement, that the Coeur d'Alenes had to be treated as a tribe. Simpson again repeated his instructions to buy "lands for their timber and mineral." He adds, "Of course the more land you let us have the more money you will get." To which Seltice responded, "My dear friends, if our object was money you would be correct, but money is no object; our land we wish to keep." They responded to each other several times and recessed. When they came back Simpson started anew, this time concerning water.

> Well, gentlemen, we have talked the matter over as commissioners, and we would like to know, now more particularly about the boundaries on the water lines; it is not what we expected to

> get, but still we will take this with the understanding: There are some who have claims on these lands and you will settle with them.

Then the discussion turned back to the Indians who had claims near the Mission. The Commissioners refused to pay them, and said the tribe had to deal with them. The discussion next turned to the question of price. Seltice asked for $5.00 an acre, to which the commission responded it was willing to pay $2.50 an acre. Seltice interjected a comment that indicated he now knew that lands on the west of the lake were to be a part of the cession, for he said:

> You know it is against our wishes to sell any land, but you wanted to buy. We did not care for the land on the west by Spokane. I think it is worth what we ask. We offered that and you think it is too much. When you make your report to Washington let them say whether it is too much.

Seltice evidenced very shrewd bargaining power, and exercised his patience to good effect. He knew there was mineral value to the land and wanted a just payment for the land.[388]

At the close of the session on August 31, the commission was unsure it could complete a successful agreement. Commissioner Shupe wrote to Congressman Mitchell of Oregon saying that they did not think they

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[388] United States. Congress. Senate. *A Letter of the Secretary of the Interior Relative to the Purchase of a Part of the Coeur D'Alene Reservation*. Ex. Doc. No. 14. 51st Congress, 1st Session. Washington, D. C.: Government Printing Office, 1889. [215]

could get done with the negotiations within the allotted time, and asking for an extension of both time and money. Mitchell responded by telegram that he could give no assurances, and suggested they contact the Commissioner of Indian Affairs, at the same time himself asking the Commissioner to facilitate their work. But by the time the Commissioner of Indian Affairs had actually received all the correspondence the Coeur d'Alene Commission had achieved its treaty.[389]

Eight days later, on September 8, 1889, they again met in Council, this time with the male adults of the tribe. Clearly many discussions had gone on behind the scenes. Coeur d'Alene leader Pierre Wildshow indicated he would not refuse to sell the land, and observed that about half of the reservation was being disposed of.

> The young Indians want to make the Coeur d'Alene River the line, and from Spokane bridge down to Rockford, giving the two big mountains. I tell you this to make your hearts good and the Indians' hearts good.

Simpson said he understood the following to be the proposed arrangement:

> We understand you to mean on the west side – this side of the lake, down to Rockford from

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[389] Shupe to Mitchell, August 31, 1889, Letters Received, Record Group 75, National Archives. [536]

Mitchell to Simpson, September 4, 1889, telegram, Letters Received, Record Group 75, National Archives. [537]

Mitchell to Commissioner, September 4, 1889, Letters Received, Record Group 75, National Archives. [538]

> Spokane bridge, and along the northern boundary. I want you to extend this line from the mouth of the Coeur d'Alene River due east to the boundary of the reservation. You can speak now among yourselves and understand the line, and if satisfactory I think we can make an arrangement.

Presumably the Coeur d'Alenes did speak among themselves. Pierre Wildshow observed correctly that the tribe had offered them somewhat more land, but "since you wish to make the line where you have proposed this last time it will give us a little more land." He also said that the tribe wanted extra pay for the improvements of the two old men still living at the Old Mission, for the improvements of four men living near Spokane bridge, for improvements on the Coeur d'Alene River, and for a hay farm that was being operated by Coeur d'Alenes near Fort Sherman.[390] Simpson responded by providing the description of the entire parcel the government was buying and by commenting on the $650,000.00 in total payment from both the 1887 and 1889 agreements, but noting that the tribe must take care of people who had individual improvements.

The Coeur d'Alenes argued rather vehemently that the government said it did not want to buy Indian farms and that it should not be buying those farms, thus, logically, it should pay separately for these improvements. But the Commission was adamant. Seltice explained that

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[390] George, Oswald. "Historical MSS." Library and Archives. Cheney-Cowles Museum, Spokane, Washington, 1968, pp. 1-6, also mentions the hay farm then operated by the Coeur d'Alene. [71]

he had been sick during the discussion the previous day (the commission provided no record of that meeting) and he felt very bad about it because he had not been able to talk. Now he believed the negotiations were finished.

> SALTISE: Five hundred thousand dollars is a little sum; the ground is full of gold that is worth millions.
>
> We are in a hurry to get through thrashing; can you come tomorrow . . .

On September 9, 1889, the agreement [see Appendix IX] was signed by Seltice, other leaders, and over one hundred Coeur d'Alene men, at least one of whom was known to speak English. After the agreement was signed the commissioners thanked the priest, Father Cornano, Stephen E. Liberty (United States interpreter), and the chiefs and headmen of the tribe. Seltice, in turn, thanked the commission for their "detainment" [patience]. Seltice selected Peter Moctelme, Regis, Pierre Wildshow, and Stephen Liberty to go to Washington as part of a Coeur d'Alene delegation. Liberty was one of the white men adopted by Seltice. Authorities later concluded that the four whites and the members of their families should each receive per capita shares of the payment to the Coeur d'Alene Tribe for the ceded territory. The accompanying map shows the line drawn through the lake, just as it was discussed by the parties to the council, both the Coeur d'Alenes and the representatives of the United States. The United States succeeded in obtaining, through this cession, the greater portion of Lake Coeur d'Alene, including that which was most valuable for navigation to the mines. The United States clearly wanted to obtain the complete steamer route from Coeur d'Alene City to the

Old Mission. Transcripts of negotiations show that the United States believed the lake was being partitioned, with the tribe retaining the southern third and the United States obtaining the northern two-thirds. The official report to Congress also included the entire text of the official reports on the 1887 agreement.[391]

The Commissioners telegraphed the Indian Office on September 11, 1889, reporting that they had concluded a treaty with the Coeur d'Alenes, providing a description of the boundaries and the cost to the government.[392] On the same day, the Coeur d'Alene Commission sent a letter to Indian Commissioner Morgan, which was also signed by "General" Andrew Seltice, Interpreter Steven Liberty, Agent Cole and three other Coeur d'Alene leaders, saying that an agreement had been reached. The commissioners said that they had pledged themselves to recommend that the Department send the Agent and the head Chiefs of the tribe to Washington along with their interpreter, "in order that they – the representatives of the Indians – might satisfy themselves as to the good faith of the Government in this matter." Former commissioners and the railroad had done this in the past, they said, and in view

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[391] United States. Congress. Senate. *A Letter of the Secretary of the Interior Relative to the Purchase of a Part of the Coeur D'Alene Reservation*. Ex. Doc. No. 14. 51st Congress, 1st Session. Washington, D. C.: Government Printing Office, 1889. [215]

[392] Simpson, Shupe and Humphrey to Commissioner, September 11, 1889, telegram, Letters Received, Record Group 75, National Archives. [539]

of the tribe's efforts to become civilized, the commissioners recommend approving this request.[393]

Within a week Seltice had concluded a supplemental transaction, this one to the great benefit of Frederick Post. On September 16, 1889, Seltice signed an agreement and had it notarized in the office of the Kootenai County Recorder [see Appendix IX]. Seltice said in this agreement that Frederick Post had purchased what is now known as Post Falls from the Coeur d'Alene for a "valuable consideration" in 1871 and that this property should be deeded to him and exempted from the 1889 cession. No other parties signed this document. The document was submitted to authorities in Washington. Although the Post cession was not mentioned in the official reports on the 1887 and 1889 agreements, it was examined and found valid by the Interior Department and Congress. It was later ratified and made law by Congress, along with the 1887 and 1889 agreements. Seltice later explained this action by saying Post had purchased the property from his father for $500.00.[394] This agreement is important because it indicates that both the United States and Seltice were firmly aware of the value and importance of

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[393] Simpson, *et. al.*, to Commissioner Morgan, September 11, 1889, Letters Received, Record Group 75, National Archives. [540]

[394] Kowrach, Edward J., and Thomas E. Connolly (eds.) *Saga of the Coeur D'Alene Indians: An Account of Chief Joseph Seltice*. Fairfield, Washington: Ye Galleon Press, 1990, pp. 215, 233, 315-316, and 358. [101]

The Statutes at Large of the United States of America, from December, 1889, to March 1891 . . . , Vol. XIXVI, Washington, Government Printing Office, 1891, p. 1031 (26 Stat. 1031). [221]

river channels and that this cession of such property had been made with all parties aware of riverbed values.

The historical evidence shows that the 1889 agreement included a cession of the lakebed north of the line, but was not a cession of the St. Joe River channel, nor the lakebed south of the line. It clearly shows that Seltice and the United States were aware of the economic value of river channels and lakebeds at the time of the 1889 agreements. The action of the United States in ratifying these agreements thus expressly indicated title to lakebeds and riverbeds being divided between the United States and the Coeur d'Alene Tribe. Further, the supplementary agreement indicates that Post's agreement with the tribe was contingent upon his building a mill and improving the water-power. Thus, they were aware of and dependent on the future implications of their maintained lakebed and riverbed rights as a result of the 1889 agreement.

Suggestions that there was inadequate interpretation during these negotiations seem to be completely erroneous. Reichard published a Coeur d'Alene story in 1934 dealing with white encroachment on Coeur d'Alene land, and in which "the false coyotes are the interpreters who are blamed for misrepresenting the Indian's cause in the talks with Government officials."[395] Steven Liberty seems to have greatly benefited personally from his position as interpreter for the tribe, but there is no evidence that he

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[395] Reichard, Gladys A. "The Style of Coeur D'Alene Mythology." In *Verhandlungen Des XXIV. Internationalen Amerikanisten-Kongresses Hamburg*, edited by R. Grossmann and G. Antze, pp. 243-253. Hamburg: Friederichsen, De Gruytey & Co., 1934, p. 252. [149]

was in any collusive arrangement with authorities. In fact, Liberty's knowledge of law may have helped the tribe.[396] Father Joset spoke Coeur d'Alene and many of the Coeur d'Alenes spoke English. The records of the meetings held with the commissioners suggest that negotiations were understood well on both sides of the table. Certainly the United States pressured the tribe to cede the lands, but did not force them to sell lands. Coeur d'Alene tribal leadership, especially Chief Seltice, was in close contact with the Jesuit priests, and certainly consulted with them on all important political matters. Likewise, they consulted with other white confidants, like Steven Liberty. Priests and other whites certainly had personal, religious, and professional agendas which colored their advice. Seltice, himself, may have been an imperfect leader. However, none of this suggests that the tribe had abandoned sovereign decision-making. The record suggests that these contacts helped Seltice to achieve his own objectives. The commissioners later praised Seltice's and the Coeur d'Alenes' business acumen, while at the same time saying they had made a bargain purchase.[397]

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[396] Murray, Alberta. *These My Children*. Fairfield, Washington: Ye Galleon Press, 1976, p. 61. [119]

[397] Dozier, Jack. "Coeur D'Alene Country: the Creation of the Coeur D'Alene Indian Reservation in North Idaho." *Idaho Yesterdays* (1962), p. 7. [63]

The Commissioner of Indian Affairs reported on the 1889 agreement, pointing out that the United States had been able to obtain a portion of Lake Coeur d'Alene.[398]

> Councils with the Indians were held in August last and as a result of the negotiations an agreement was concluded on the 9th day of September following, whereby the Indians agreed to sell a considerable portion of their reservation (in the northern part), valuable chiefly for minerals and timber, and embracing by far the greater portion of the navigable waters of the reservation. The terms agreed upon are regarded by the commissioners as reasonable and just alike to the Indians and the government.

The historical record provides conclusive evidence that the United States and the Coeur d'Alene discussed in detail, understood, and explicitly agreed to a 243,000 acre cession which included a 37,000 acre portion of the Lake Coeur d'Alene lakebed, and of the Coeur d'Alene riverbed in 1889. The Tribe retained ownership of the southern portion of Lake Coeur d'Alene and a portion of the St. Joe River. The United States acknowledged Coeur d'Alene title to the tribal portion of Lake Coeur d'Alene and the St. Joe River (see Maps 9 and 17).

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[398] United States. Department of the Interior. Commissioner of Indian Affairs. "Annual Report," 1889. Washington, D. C.: Government Printing Office, pp. 21-22. [250]

Peltier, Jerome. *A Brief History of the Coeur D'Alene Indians, 1806-1909.* Fairfield, Washington: Ye Galleon Press, 1981, pp. 60-66. [132]

XIII Ratification, 1890-1891

Late in 1889 the Secretary of the Interior formally reported on the 1889 "Purchase of a Part of the Coeur d'Alene Reservation" in a letter to the Senate.[399] In January, 1890, Senator J. H. Mitchell transmitted a draft of a bill to ratify the agreements made with the Coeur d'Alenes.[400] Controversy over Post's holdings on the Spokane River had continued, and the Indian Office referred the matter to the Senate Committee on Indian Affairs. The Senate Committee on Indian Affairs had reviewed the 1887 and 1889 agreements and submitted draft legislation to the Secretary of Interior for review. The Secretary referred the draft to the Commissioner of Indian Affairs who responded to the Senate providing details on how the appropriations act should be worded, with instructions on funding the required grist/saw mill, the hiring and payment of a blacksmith, per capita payments to tribal members, the survey of the reservation, and the disposal of lands opened to settlement. The Commissioner determined that only one and not two mills would satisfy the treaty language. The Indian Office provided evidence that Seltice had indeed made the agreement with Post in 1871 and pointed out that he had also begun developing the river channel for the purpose of water-power, as required in the agreement. The Indian

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399 United States. Congress. Senate. *A Letter of the Secretary of the Interior Relative to the Purchase of a Part of the Coeur D'Alene Reservation*. Ex. Doc. No. 14. 51st Congress, 1st Session. Washington, D. C.: Government Printing Office, 1889. [215]

400 Mitchell to Indian Office (note to file), January 28, 1890, Letters Received, Record Group 75, National Archives. [541]

Office hoped that the Committee could attach the Seltice/Post agreement to the legislation.[401]

Pressure to open the northern portion of the reservation now increased dramatically as whites realized the 1889 agreement was before Congress. Hundreds, if not thousands, of miners and prospectors flooded into the

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[401] Morgan to Cole, May 6, 1890, Letters Received, Colville Agency, RG 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [542]

Morgan to Cole, June 28, 1890, Letters Received, Colville Agency, RG 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [543]

United States. Congress. Senate. *Letter of the Secretary of the Interior Transmitting Correspondence in Relation to the Ratification and Confirmation of Certain Agreements Between the United States and the Coeur D'Alene Indians in Idaho Territory*. Misc. Doc. No. 95. 51st Congress, 1st Session. Washington, D. C.: Government Printing Office, 1890. [216]

United States. Congress. House. *Ratification of Coeur D'Alene Indian Treaties in Idaho*. Report No. 1109. 51st Congress, 1st Session. Washington, D. C.: Government Printing Office, 1890. [206]

United States. Congress. House. *Ratification of Coeur D'Alene Indian Treaties in Idaho*. Report No. 2988. 51st Congress, 1st Session. Washington, D. C.: Government Printing Office, 1890. [205]

Mitchell to Indian Office (note to file), January 28, 1890, Letters Received, Record Group 75, National Archives. [541]

Parker to Ingalls, March 16, 1890, Letters Received, Record Group 75, National Archives. [544]

Lee to President Harrison, May 9, 1890, Letters Received, Record Group 75, National Archives. [545]

Eleanor Lee to Commissioner of Indian Affairs, March 16, 1891, Letters Received, Record Group 75, National Archives. [546]

northern portion of the reserve. Many more individuals queried officials about when they could legally enter the reservation. The Spokanes were also becoming impatient about relocating on the Coeur d'Alene Reservation. And of course the Coeur d'Alenes, who had effectively already lost the use of the northern portion of the reservation, were impatient themselves to be paid for their ceded territory, both aboriginal and reservation.[402] Despite the pressures on Congress to ratify the agreements, the Coeur d'Alenes were still uneasy about Congress. They entered

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[402] Gildea to Cole, April 21, 1890, Letters Received, Record Group-75, National Archives. [547]

Notes to file, 1890, Letters Received, Record Group 75, National Archives. [548]

Conner to Commissioner of General Land Office, June 20, 1890, Letters Received, Record Group 75, National Archives. [549]

Conner to Commissioner of Indian Affairs, June 20, 1890, Letters Received, Record Group 75, National Archives. [550]

Thom to Secretary of the Interior, July 18, 1890, Letters Received, Record Group 75, National Archives. [551]

Thompson to Post Adjutant, August 22, 1890, Letters Received, Record Group 75, National Archives. [552]

Morgan to Cole, July 5, 1890, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [553]

Act'g Commissioner to Cole, November 15, 1890, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [554]

Acting Commissioner to Cole, October 1, 1890, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [555]

into a contract (approved by the Indian Office) with their old associate John Mullan to lobby in Congress for ratification of the two agreements.[403]

In March, 1890, the House Committee on Indian Affairs joined the Senate in officially calling for ratification of the two agreements. The House report reprinted the resolution sent to the President in 1885, in which the Coeur d'Alenes stressed the fact that the negotiations were focused on a business agreement, and said the 1889 agreement was a good one, which included acquisition of important property for the United States.[404]

> It contains a magnificent sheet of water, the Coeur d'Alene Lake, and its chief tributary, to wit, the Coeur d'Alene River, over the waters of

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[403] Secretary of the Interior John W. Noble to Commissioner of Indian Affairs, June 27, 1890, Letters Received, Record Group 75, National Archives. [556]

Belt to McCammon, May 10, 1890, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [557]

Mullan to Gildea, May 15, 1890, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [558]

Acting Commissioner to Cole, October 11, 1890, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [559]

Magnuson, Richard G. *Coeur D'Alene Diary; the First Ten Years of Hardrock Mining in North Idaho*, 1968, p. 79. [109]

[404] United States. Congress. House. *Ratification of Coeur D'Alene Indian Treaties in Idaho*. Report No. 1109. 51st Congress, 1st Session. Washington, D. C.: Government Printing Office, 1890. [206]

> which steamers now ply daily form the city of Coeur d'Alene to the old Coeur d'Alene Mission, there connecting with a railway system penetrating into the very heart of said Coeur d'Alene mineral belt. It also controls the outlet of said lake, to wit, the Spokane River.

On July 3, 1890, "An act to provide for the admission of the State of Idaho into the Union" became law and Idaho entered the Union.[405] The Idaho State Constitution had been written at a convention held in the summer of 1889 and was passed by the Idaho voters in November of 1889. The July 3, 1890 Act making Idaho a state included a section (Article XXI, Section 19) disclaiming ownership of Indian lands:[406]

> And the people of the state of Idaho do agree and declare that we forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indians or Indian tribes; and until the title thereto shall have been extinguished by the United States, the same shall be subject to the disposition of the United States, and said Indian

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[405] United States. Congress. *The Statutes at Large of the United States of America from December 1889, to March, 1891*, Washington, D. C.: Government Printing Office, 1891, pp. 215-219. [221]

[406] Schwantes, Carlos A. *The Pacific Northwest: An interpretive History*. Lincoln and London: University of Nebraska Press, 1989, pp. 212-215. [160]

Idaho State. *Idaho Code*. Charlottesville, Virginia: The Michie Company, 1993, p. 19. [92]

> lands shall remain under the absolute jurisdiction and control of the congress of the United States . . .

By late 1890, Indians and non-Indians in the region believed that the agreements would be ratified. It had become practically impossible to prevent settlers and prospectors from entering the reservation. "Boomers" had begun gathering in neighboring towns throughout the winter in anticipation of the land rush. Despite the fact that the Coeur d'Alenes favored the agreements and had even hired a lobbyist to ensure congressional ratification, some New England religious groups expressed opposition to the agreements, because the tribe would be losing some of its land base. Some land speculators in Spokane opposed ratification because of the special agreement with Frederick Post. But as winter passed, large numbers of settlers waited on the borders of the reservation for their opportunity to make entries on the newly opened territory. Early in 1891 Idaho citizens petitioned Congress to approve the Coeur d'Alene agreements and yet another measure was introduced to ratify both agreements.[407]

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[407] United States. Congress. *Congressional Record*. 51st Congress, 2nd Session, pp. 966, 1525. Washington, D. C.: Government Printing Office, 1891. [190]

Magnuson, Richard G. *Coeur D'Alene Diary; the First Ten Years of Hardrock Mining in North Idaho*, 1968, pp. 79-80, 95, 124-126. [109]

Acting Commissioner to Cole, December 24, 1891, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [560]

Finally, on March 3, 1891, Congress ratified both the 1887 and the 1889 agreements, including the agreement with Frederick Post. A provision to that effect was included in the Indian Appropriations Act for the year.[408]

Acting Commissioner to Cole, August 28, 1891, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [561]

Acting Commissioner to Cole, August 6, 1891, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [562]

Acting Commissioner to Cole, May 27, 1891, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [563]

Acting Commissioner to Cole, June 8, 1891, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [564]

Acting Commissioner to Cole, March 28, 1891, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [565]

[408] United States. Congress. *The Statutes at Large of the United States of America from December 1889, to March, 1891,* Washington, D. C.: Government Printing Office, 1891, pp. 989-991, 1027-1032. [221]

United States. Department of the Interior. General Land Office. "Report of the Commissioner of the General Land-Office for the Fiscal Year Ended June 30, 1891," 1891. Washington, D.C.: Government Printing Office, p. 352. Post lost no time in obtaining a survey of his holdings, a contract for which was let by July, 1891. [272]

United States. Department of the Interior. General Land Office. "Report of the Commissioner of the General Land-Office

It is ironic that in the 1887 agreement the promise was made that the 1873 reservation will "be held forever as Indian land and as homes for the Coeur d'Alene," though the 1889 agreement, also ratified by the same act, approved of cession to the United States of a portion of the reservation. "Boomers," who had anticipated the Presidential signature, were waiting in large numbers to enter the reservation. Non-Indians were well-aware that the Indians were also receiving $500,000.00 and they looked on the "money and opening of the Reservation . . . as the first blessings of statehood."[409] Troops had to evict boomers who trespassed on the reserve early. In April, 1891, the reservation lands were opened and boomers quickly filed entries, large numbers of them having no intention of staying, but only selling their entries. Some problems were encountered when Indians attempted to collect for improvements in the ceded lands.

> The Indians endeavored to make some trouble with the new settlers, but no serious difficulties were anticipated.

Indians tried to collect for improvements they left, but eventually the settlers refused to pay. The Indians set fire

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for the Fiscal Year Ending June 30, 1893," 1893. Washington, D.C.: Government Printing Office, p. 333, reported that both the survey of the ceded lands and Post's lands were completed by July, 1893. [274]

[409] "Magnuson, Richard G. *Coeur D'Alene Diary; the First Ten Years of Hardrock Mining in North Idaho*, 1968, p. 124. [109]

to grass along the river and made threats, but no real trouble developed."[410]

The Commissioner of Indian Affairs instructed the Agent to complete a tribal census roll which would be used to make per capita payments to tribal members.[411] A small controversy developed when a Coeur d'Alene who did not live on the reservation, evidently having rejected Catholic conversion, was left off the census roll. He hired John Mullan to represent him and eventually Seltice and other tribal leaders allowed his name to be reinstated on the roll.[412] In April, 1892, four hundred twenty-six

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[410] Magnuson, Richard G. *Coeur D'Alene Diary; the First Ten Years of Hardrock Mining in North Idaho*, 1968, pp. 130-131. [109]

United States. Department of the Interior. General Land Office. "Report of the Commissioner of the General Land-Office for the Year 1892," 1892. Washington, D. C.: Government Printing Office, p. 188. [273]

[411] Acting Commissioner to Cole, March 17, 1891, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [566]

Morgan to Cole, June 26, 1891, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [567]

Morgan to Cole, June 30, 1891, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [568]

[412] Commissioner Morgan to Secretary of the Interior, November 4, 1891, Letters Received, Record Group 75, National Archives. [569]

Cole to Commissioner, October 24, 1891, enclosing certificate approving the census roll, Letters Received, Record Group 75, National Archives. [570]

members of the tribe reportedly received about $1,137.00 each.

> In late April, the Coeur d'Alene Indians flocked to the surrounding area to cash the checks they received from Uncle Sam for their land. They averaged about $1,200 each and totalled about $600,000. Money was flowing like water near the reservation.

Many inquiries about these per capita payments came into the Indian Office prior to the day the money was distributed.[413]

At least thirty-two of the whites adopted by Seltice and their relatives shared in the per capita payments of

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Seltice *et. al.*, October 21, 1891, Letters Received, Record Group 75, National Archives. [571]

Mullan to Indian Office, October 6, 1891, with enclosures, Letters Received, Record Group 75, National Archives. [572]

Commissioner to Quin a mo sey, August 27, 1891, Letters Received, Record Group 75, National Archives. [573]

Morgan to Cole, October 10, 1891, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [574]

Morgan to Cole, November 7, 1891, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [575]

Acting Commissioner to Cole, December 14, 1891, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [576]

[413] Wells to Secretary of the Interior, June 17, 1891, Letters Received, Record Group 75, National Archives. [577]

Morgan to Cole, February 9, 1892, Letters Received, Record Group 75, National Archives. [578]

1891, receiving a total of more than $33,000.00, or about 7% of the proceeds.[414] Other funds were loaned out to the white communities "where it could earn dividends."[415] The Editor of the *Spokane Enterprise* was outraged, and wrote to the Commissioner of Indian Affairs.[416]

> I am a resident here for a good number of years, also am Editor of a paper. I have studied Republic politics. I am a republican all over. My Father fought for the union. I am a tax-payer and a voter and I love the flag of our Country. But when I see such injustice go on as is carried on in this place it makes me rebel in my heart against our Federal government and all its institutions. I refer to the money that is to be paid to the Coeur d'Alene Indians, not to the Indians but to a lot of French Canadians and Irish just from the sod. Butleir [Boutellier] is a naturalized citizen of the U. S. who has taken his homestead claim improved it and sold the same for the sum of $3,500 and this was spent by a family. His wife being 1/8 breed Cayuse squaw he used his deceitful practice with the Holy Fathers at the

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[414] Murray, Alberta. *These My Children*. Fairfield, Washington: Ye Galleon Press, 1976, p. 83. Murray's history of these men provides some evidence that seems to indicate the white men were also used by Seltice and the Coeur d'Alene in later years to get around the prohibition on alienation of lands. [119]

[415] Peltier, Jerome. *A Brief History of the Coeur D'Alene Indians, 1806-1909*. Fairfield, Washington: Ye Galleon Press, 1981, p. 66. [132]

[416] H. W. Desgrangers, Editor of the Spokane Enterprise, January 25, 1892, Letters Received, Record Group 75, National Archives. [579]

> Mission and his wife with Chief Saltise and got adopted into the [tribe].

The editor was outraged that Nixon, Peavey, Liberty and Boutellier were receiving such a large percentage of the Indians' money, and called it fraud. "The Indians themselves are industrious and many are good farmers sober and will make good citizens." Another complaint was made against Liberty. It was said that he was a drunkard, was separated from his 1/4 Coeur d'Alene wife, who had custody of his children, yet he had filed a claim for all of them in the amount of $9,096.76. Liberty's claim was temporarily suspended, until the Agent could investigate the matter. Liberty hired an attorney, however, and in the end the claim seems to have been paid.[417]

XIV The Harrison Townsite Cession, 1892-1894

As 1891 came to a close the Coeur d'Alenes believed they had finally secured permanent title to a reservation which they could call home "forever." Forty years earlier they had held 4,000,000 acres. Now their reservation totalled 345,000 acres. But they still controlled a large

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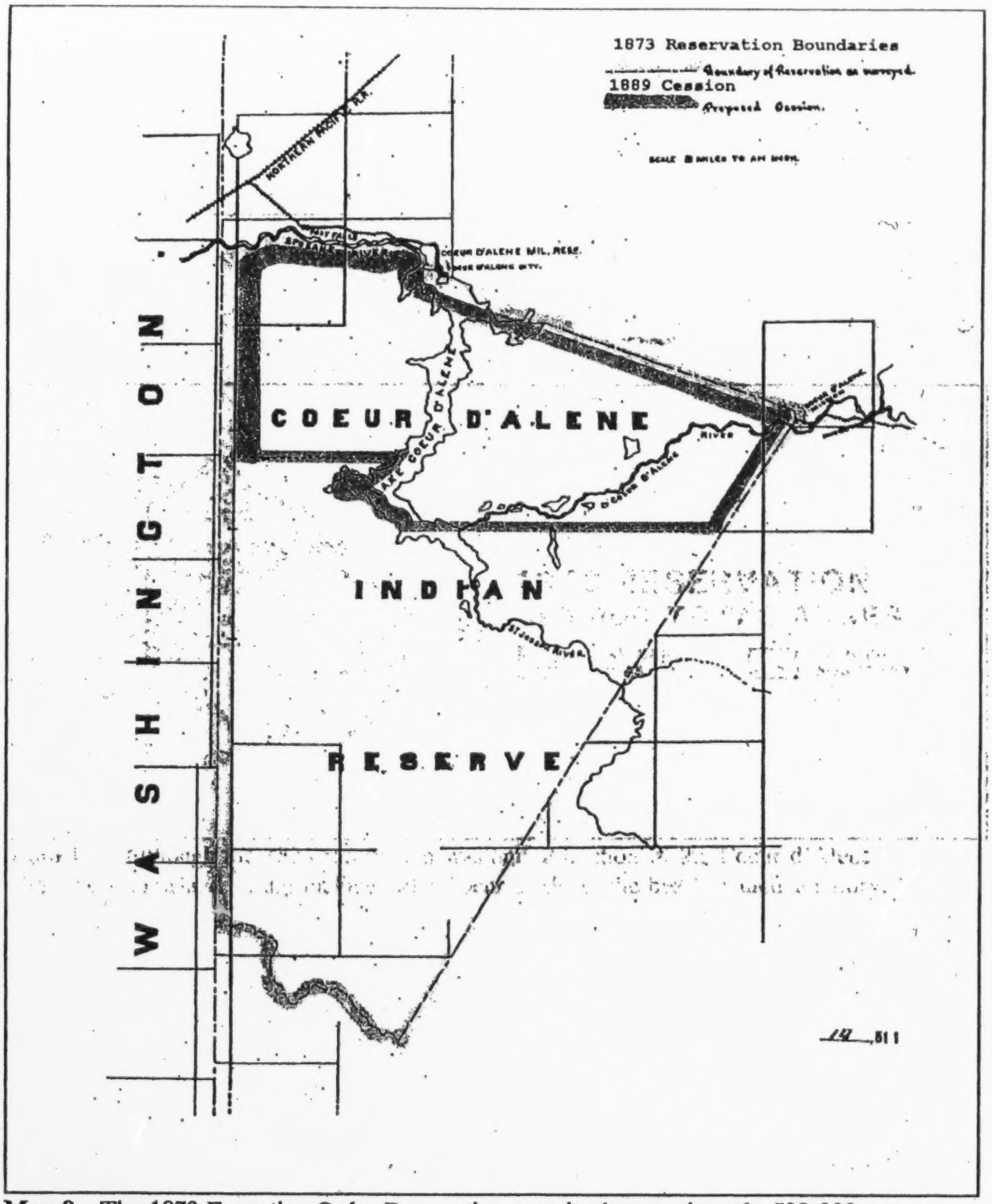
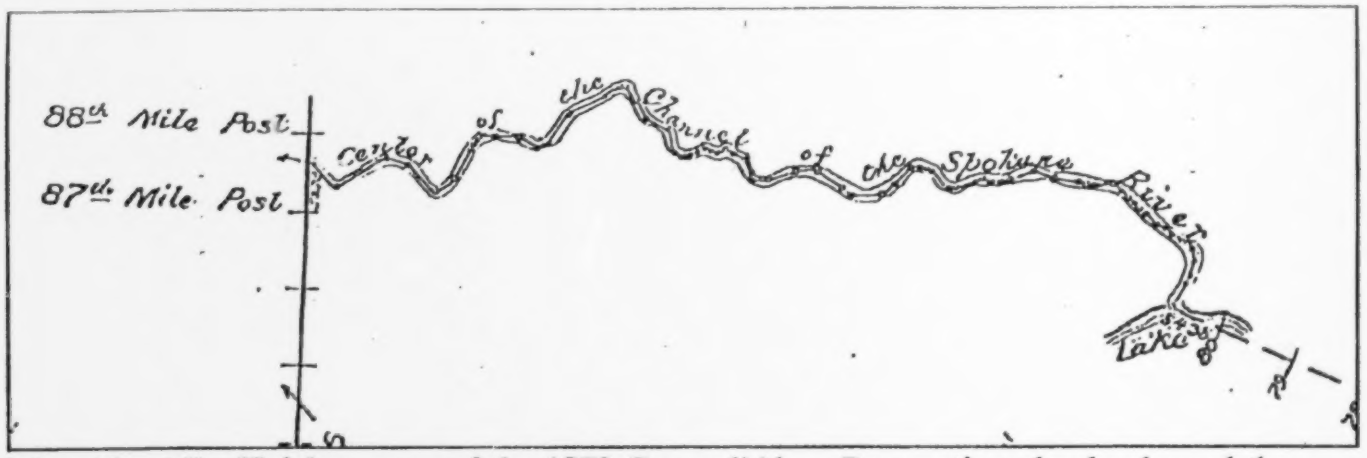
[417] Morgan to Cole, March 16, 1892, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [580]

Morgan to Cole, March 16, 1892, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [581]

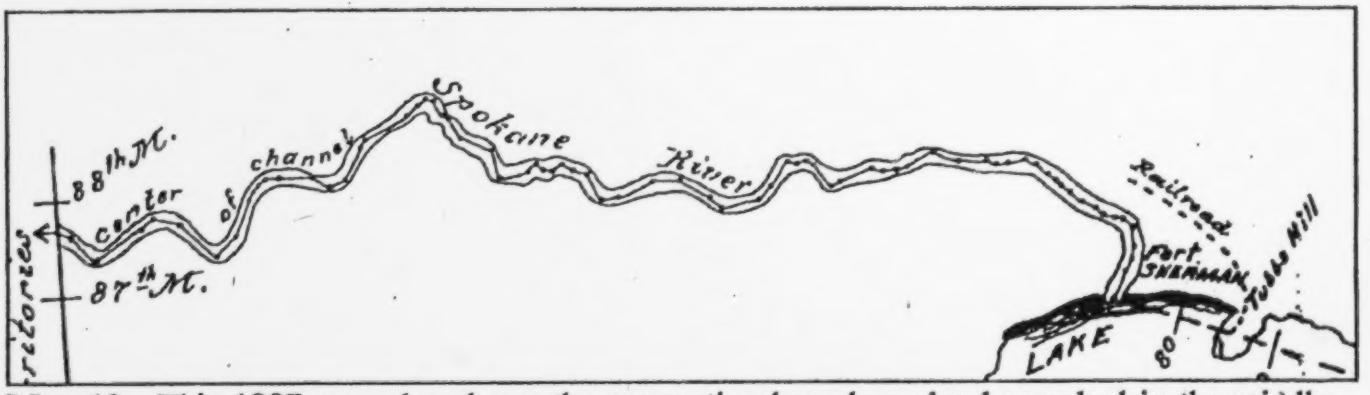
Franklin to Cole, March 21, 1892, Letters Received, Colville Agency, Record Group 75, Pacific Northwest Regional Archives; Seattle, Washington; National Archives. [582]



Map 9: The 1873 Executive Order Reservation contained approximately 590,000 acres. The 1889 cession reduced the reservation to about 345,000 acres. From Senate Executive Document [278].

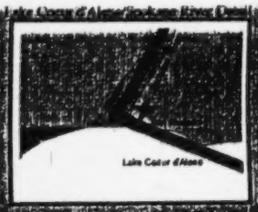


Map 11: All official surveys of the 1873 Coeur d'Alene Reservation clearly showed the boundary line drawn down the middle of the Spokane River. National Archives, 1883 [679].



Map 12: This 1887 map also shows the reservation boundary clearly marked in the middle of the Spokane River channel. National Archives, 1887 [476].

1889 Simpson Cession Proposal
(U.S. Understanding)



Lake Coeur d'Alene

Washington

Idaho

1:256587

0 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 Miles

Legend

- 1873 Reservation Boundary
- 1889 Simpson Offer
- Railroads
- Major Rivers and Streams
- Lakes

Pre-settlement Land Cover

- Prairie
- Forest
- Desert
- Wetlands

U.S.A. & COEUR D'ALENE TRIBE v. STATE OF IDAHO
Case No. CIV-94-0328-N-EJL

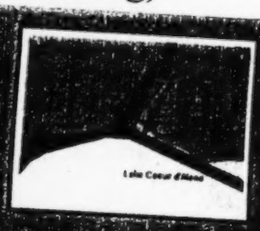
TRIAL EXHIBIT

* 2291*

COEUR D'ALENE TRIBE

Locator

1889 Tribe's Cession Response
(U.S. Understanding)



Lake Coeur d'Alene

Washington

Idaho

Pine C.

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0 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 Miles

U.S.A. & COEUR D'ALENE TRIBE v. STATE OF IDAHO
Case No. CIV-84-0328-N-EJL

TRIAL EXHIBIT

* 2292*

Legend

- 1873 Reservation Boundary
- 1889 Tribe's Cession Response
- Railroads
- Major Rivers and Streams
- Lakes

Pre-settlement Land Cover

- Prairie
- Forest
- Desert
- Wetlands

COEUR D'ALENE TRIBE

Locator

1889 Cession Agreement
(U.S. Understanding)

Spokane River

Fort Sherman

Lake Coeur d'Alene

Pacific RR

Washington

Idaho

Pine C.

1:256587

0 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 Miles

N

U.S.A. & COEUR D'ALENE TRIBE v. STATE OF IDAHO
Case No. CIV-94-0326-N-EJL

TRIAL EXHIBIT

* 2298*

Legend

- 1873 Reservation Boundary
- 1889 Cession Agreement
- Railroads
- Major Rivers and Streams
- Lakes

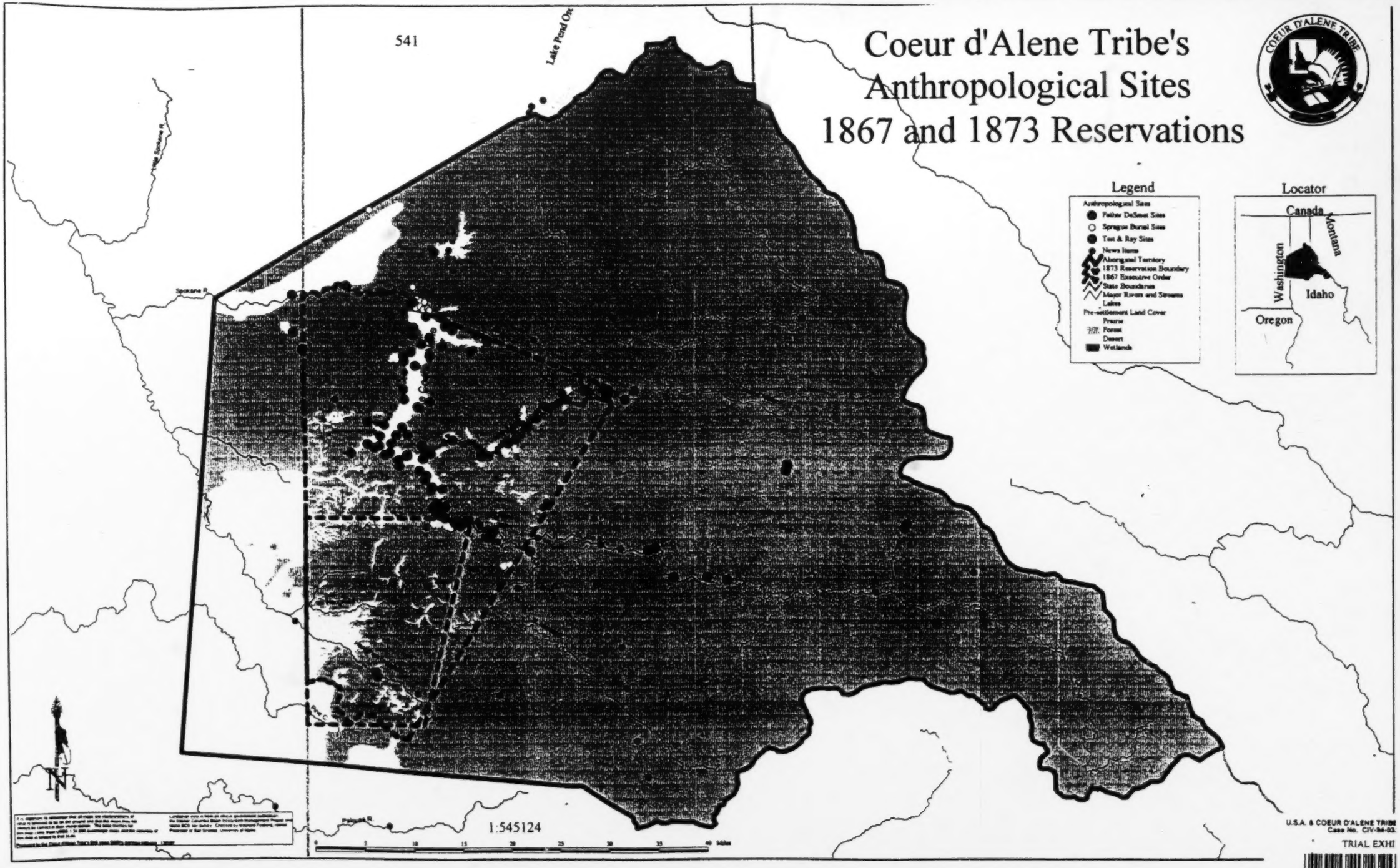
Pre-settlement Land Cover

- Prairie
- Forest
- Desert
- Wetlands

COEUR D'ALENE TRIBE

Locator

Coeur d'Alene Tribe's Anthropological Sites 1867 and 1873 Reservations



U.S.A. & COEUR D'ALENE TRIBE
Case No. CIV-94-03-
TRIAL EXHI

(6)

JAN 25 2001

Supreme Court, U.S.
FILED
JAN 25 2001
CLERK

No. 00-189

In The

Supreme Court of the United States

STATE OF IDAHO,

Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

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58 pp

QUESTION PRESENTED

In *United States v. Alaska*, 521 U.S. 1 (1997), this Court held, in the context of a statehood act, that congressional ratification of an executive order reservation known to contain submerged lands may imply an affirmative intent to defeat state title to such submerged lands. The question presented here is whether a defeat of state title to submerged lands is implied when Congress, in a pre-statehood act, authorizes cession negotiations with an Indian tribe occupying an executive order reservation for the purchase of lands "not agricultural and valuable chiefly for minerals and timber," with the purpose of releasing submerged lands from the reservation.

PARTIES

The parties to the proceedings before the Court of Appeals for the Ninth Circuit were the State of Idaho, as the appellant and cross-respondent, the United States of America, as respondent, and the Coeur d'Alene Tribe, as respondent and cross-appellant.

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OPINIONS BELOW

The decision of the Ninth Circuit Court of Appeals (Pet. App. 1-30) is reported at 210 F.3d 1067 (9th Cir. 2000). The decision of the district court (Pet. App. 31-86) is reported at 95 F.Supp.2d 1094 (D. Idaho 1998).

JURISDICTIONAL STATEMENT

The court of appeals entered its judgment on May 2, 2000. The petition for a writ of certiorari was filed with this Court on July 25, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The Indian Department Appropriations Act of May 15, 1886, 24 Stat. 29, provides in relevant part:

> To enable the Secretary of the Interior to negotiate with . . . the Coeur d'Alene Indians for the cession of their lands outside the limits of the present Coeur d'Alene reservation to the United States, fifteen thousand dollars, or so much thereof as may be necessary, to be immediately available; but no agreement made shall take effect until ratified by Congress.

The Indian Department Appropriations Act of March 2, 1889, provides in relevant part:

> That the Secretary of the Interior be, and he is hereby, authorized and directed to negotiate with the Coeur d'Alene tribe of Indians for the purchase and release by said tribe of such portions of its reservation not agricultural and valuable chiefly for minerals and timber as such tribe shall consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of

> Indians, which purchase shall not be complete until ratified by Congress and for the purpose of such negotiation, the sum of two thousand dollars, or so much thereof as may be necessary, is hereby appropriated; the action of the Secretary of the Interior hereunder to be reported to Congress at the earliest practicable time.

Act of March 2, 1889, 25 Stat. 980, 1002.

The relevant portions of the Indian Department Appropriations Act of March 3, 1891, 26 Stat. 989, 1027, which ratified two cession agreements with the Coeur d'Alene Tribe, are set out in the Joint Appendix at 376-88. The Act of May 30, 1888, 25 Stat. 160, which granted a railroad right-of-way across the Coeur d'Alene Indian Reservation, is set out in the Joint Appendix at 137-40.

STATEMENT

At issue in this case are the beds and banks, or submerged lands, of those portions of Coeur d'Alene Lake and its tributary, the St. Joe River, that lie within the exterior boundaries of the Coeur d'Alene Indian Reservation. As this Court has previously remarked, Coeur d'Alene Lake is one of the nation's "most beautiful lakes." *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 264 (1997). Although a portion of the Lake lies within the exterior boundaries of the Reservation, the land surrounding the Lake is owned predominately by non-Indians, as is most land within the Reservation.[1] Of the

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[1] By the Act of June 21, 1906, 34 Stat. 335, the Coeur d'Alene Reservation was allotted, and the surplus lands sold to non-Indians.

Reservation's 5,802 residents, only 749 are Native Americans. *Statistical Record of Native North Americans*, 1036 (M. Reddy. ed. 1993).

The State of Idaho has always had a special relationship to the Lake. In 1890, when Congress was debating Idaho's admission to the Union, one of the questions Congress addressed was whether the Idaho Territory had "the requisite population and resources to entitle [it] to statehood." H. R. Rep. No. 4053, 50th Cong., 2d Sess. 1 (1889). During these congressional debates, Coeur d'Alene Lake and its tributaries were frequently mentioned as important resources justifying Idaho's statehood.[2]

After statehood, early Idaho laws focused on the use of Coeur d'Alene Lake and its tributaries as commercial corridors for the transport of lumber. In 1903, the Idaho Legislature designated "Coeur d'Alene Lake and all of the streams tributary to and emptying into the same" as a lumber district. 1903 Idaho Sess. Laws 89.[3]

In later years, the State began addressing the need to preserve the Lake for public use. In 1927, the Idaho

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[2] *See* Argument of F.T. Dubois, in H. R. Rep. No. 4053, 50th Cong., 2d Sess. 56 (1889) ("lakes whose waters are as clear as crystal are plentifully scattered throughout the Territory . . . [t]he largest of these are Coeur d'Alene and Pend Oreille . . . Lake Coeur d'Alene is about 30 miles long and 4 miles wide, on which a daily line of steamers runs"); Remarks of Mr. Dorsey, 21 Cong. Rec. 2929 (noting that Idaho's waterways included the Spokane River, the Coeur d'Alene River, and the St. Joe River); Remarks of Mr. Dubois, *id.* at 2938 (noting that Coeur d'Alene Lake was an "important lake" of Idaho).

[3] Lumber districts were limited to certain designated waterways, referred to later in the same act as "waters of this State." 1903 Idaho Sess. Laws 89, 93.

Legislature declared submerged lands under Coeur d'Alene Lake "to be devoted to a public use in connection with the preservation of said [lake] in [its] present condition as a health resort and recreation place for the inhabitants of the state. . . . " Idaho Code § 67-4305 (Supp. 2000). The State also appropriated the waters of Coeur d'Alene Lake "in trust for the people of the state of Idaho," in order to preserve the water "for scenic beauty, health, recreation, transportation and commercial purposes. . . . " Idaho Code § 67-4304 (1995). Recreational opportunities were also preserved through the establishment of two state parks along the shores of Coeur d'Alene Lake and the St. Joe River. Idaho Code §§ 67-4202, 4212 (1989 & Supp. 2000). Both parks are within the exterior boundaries of the Coeur d'Alene Reservation.

Idaho also acted to protect the public's rights to the Lake and its tributaries. In 1931, the Idaho Legislature created a commission to "study and investigate ways and means of eliminating from the Coeur d'Alene River and Coeur d'Alene Lake, so far as practicable, all industrial wastes which pollute or tend to pollute the same. . . . " Idaho Code §§ 70-201, 204 (1999). Idaho prohibited dredge mining on "[t]he St. Joe River, including tributaries, from its origin to its confluence with Coeur d'Alene lake. . . . " Idaho Code § 47-1323 (1997). Idaho regulated encroachments upon Coeur d'Alene Lake to protect "property, navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty and water quality. . . . " Idaho Code § 58-1301 (1994).

State courts confirmed state title to the submerged lands of the Lake, including those portions within the boundaries of the Coeur d'Alene Indian Reservation. *West v. Smith*, 511 P.2d 1326, 1329-30 (Idaho 1973). The

Idaho courts have also confirmed that the primary uses of the Lake are public in nature. *See Shephard v. Coeur d'Alene Lumber Co.*, 101 P. 591, 592 (Idaho 1909) (holding Coeur d'Alene Lake "is a public highway"); *Burrus v. Edward Rutledge Timber Co.*, 202 P. 1067, 1068 (Idaho 1921), quoting *Northern Pac. Ry. Co. v. Hirzel*, 161 P. 854 (Idaho 1916) (holding that State holds bed of Coeur d'Alene Lake "for the use and benefit of the whole people"); *Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club*, 671 P.2d 1085, 1088 (Idaho 1983) (applying public trust doctrine to bed of Coeur d'Alene Lake).[4]

For reasons unknown to the State, the federal government waited over 100 years before challenging Idaho's assumption of sovereignty over the submerged lands of Coeur d'Alene Lake and its navigable tributaries. It was not until 1994 that the government brought an action to assert ownership of submerged lands within the current boundaries of the Coeur d'Alene Reservation, excluding

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[4] Early Idaho court decisions created some confusion over proprietary rights to the submerged lands of the Lake and other navigable waters within Idaho. The Idaho Supreme Court mistakenly ruled that Idaho had adopted the English common law principle limiting sovereign title to those rivers or streams affected by the tide, with the beds of nontidal streams owned in fee by the riparian owner. *Johnson v. Johnson*, 95 P. 499, 502-03 (Idaho 1908). The Idaho Supreme Court later overruled its earlier decision, *Callahan v. Price*, 146 P. 732, 735 (Idaho 1915), and even repudiated it as "clearly a legislative act and not judicial." *Northern Pac. Ry. Co. v. Hirzel*, 161 P. 854, 859 (Idaho 1916). Thereafter, the Idaho courts have consistently recognized and confirmed state title to all submerged lands within the State, including Coeur d'Alene Lake. *E.g., Bowman v. McGoldrick Lumber Co.*, 219 P. 1063, 1065 (Idaho 1923); *Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1088 (Idaho 1983).

submerged lands within Heyburn State Park, which lies within the Reservation boundaries.[5]

The government's action was filed in the Federal District Court for the District of Idaho, and the Coeur d'Alene Tribe intervened. In its ruling for the government and the Tribe, the district court made extensive factual findings in this case, which are not in dispute. As that court found, before the arrival of European settlers, the Coeur d'Alene Tribe occupied millions of acres in northern Idaho and northeastern Washington, centered on Coeur d'Alene Lake, the Coeur d'Alene River, the St. Joe River, and the Spokane River. Pet. App. 43. The Tribe's villages were located around the Lake and the rivers, which provided fish, game, and plants necessary to the Tribe's subsistence. Pet. App. 43-45.

In the 1840s, the Coeur d'Alenes, with the help of Jesuit missionaries, began to cultivate small garden plots. Pet. App. 46. When non-Indian settlers began to arrive in northern Idaho, concerns arose over potential conflicts between the Tribe's rights of occupancy and the land claims of the settlers. In response, President Johnson, in 1867, established a small reservation for the Tribe in the Hangman Valley, which lies some miles south of Coeur d'Alene Lake. Pet. App. 50. Only a small sliver of the

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[5] The federal government's action against the State followed on the heels of an unsuccessful action brought by the Coeur d'Alene Tribe. In 1991 the Tribe brought a quiet title action against the State of Idaho in federal district court, claiming ownership of submerged lands within both the current and former boundaries of the Coeur d'Alene Reservation. The Tribe's claims against the State were dismissed as a violation of the State's sovereign immunity. The dismissal was ultimately upheld by this Court in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997).

Lake lay within the boundaries established by President Johnson. *Id.*

The Tribe was apparently unaware of the 1867 Reservation; in 1871 they sent a petition to the Commissioner of Indian Affairs requesting that the farmlands in the Hangman Valley be set aside for their use. *Id.* In 1872, they sent a second petition, requesting the addition of the valleys along the St. Joe and Coeur d'Alene Rivers. Pet. App. 50-51. In explaining their needs, the Tribe wrote:

> [W]e are not as yet quite up to living on farming: with the work of God we took labor too, we began tilling the ground and we like it: though perhaps slowly we are continually progressing; but our unaided industry is not as yet up to the white man's. We think it hard to leave at once old habits to embrace new ones: for a while yet we need have some hunting and fishing.

Pet. App. 51; App. 27.[6]

In 1873, the Commissioner of Indian Affairs directed a three member commission to visit non-treaty tribes within Idaho and induce them to settle upon designated reservations. Pet. App. 54. The commissioners met with

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[6] Other correspondence from this time frame offered conflicting assessments of the Tribe's needs. Several reports emphasized the Tribe's commitment to farming, while other accounts noted a continued reliance on fishing. Pet. App. 52. The trial court concluded that the estimates of tribal reliance on farming were not necessarily based on personal knowledge, and were inflated by cultural and personal bias, and gave greater weight to the accounts depicting the Tribe as reliant on fishing. Pet. App. 52-53. One letter emphasized by the trial court was from surveyor David P. Thompson, who suggested enlarging the reservation to include fisheries on Coeur d'Alene Lake. Pet. App. 52; App. 30-31.

representatives of the Coeur d'Alene Tribe, and, in four days of negotiations, agreed to establish a reservation that included the valleys of the St. Joe and Coeur d'Alene Rivers, and the lands surrounding all but the extreme northern portion of Coeur d'Alene Lake. Pet. App. 55-56; App. 32-37. The agreement provided that it was not binding until ratified by Congress. Pet. App. 56.

One member of the commission, Idaho Territorial Governor Thomas Bennett, explained in a letter to an Idaho newspaper that the Tribe had demanded an extension of their reservation to include fishing and mill privileges on the Spokane River. Pet. App. 56-57; App. 38-41. The official report to the Commissioner of Indian Affairs, however, written by commission member John Monteith, made no mention of such demands, but explained that the Reservation boundaries were drawn to include Indian farms and to exclude lands claimed by white settlers. Pet. App. 56. The boundary along the Spokane River was drawn to avoid the cost of building a steam mill for the Tribe by making use of readily available water power. *Id.*

Three months after the signing of the agreement, President Ulysses S. Grant, on November 8, 1873, set apart a reservation for the Tribe, incorporating the boundaries described in the agreement. Pet. App. 57. The executive order was the result of a request from the Commissioner of Indian Affairs, who informed the Secretary of Interior that the order was needed to protect the agreed-upon lands "from trespass by white persons pending the action of Congress upon said agreement." *Id.*

Although the Commissioner of Indian Affairs had requested the executive order as a temporary measure pending ratification, Congress never ratified the agreement. The lack of congressional action resulted in the

executive order remaining in place through the next decade. This state of affairs was not satisfactory to the Tribe, and on March 23, 1885, they submitted a petition to the federal government requesting new negotiations, so that the Tribe would be "compensated for such portion of their lands not now reserved to them; [and] that their present reserve may be confirmed to them." Pet. App. 68, quoting H. R. Rep. No. 1109, 51st Cong., 1st Sess. 42 (1890).

The next year, Congress authorized negotiations with the Tribe for the cession of their lands outside the limits of the 1873 Reservation, and provided that any agreement reached would not take effect until ratified by Congress. Act of May 15, 1886, 24 Stat. 29, 44; App. 50. The authorized negotiations occurred in 1887, resulting in a proposed agreement that provided that "the Coeur d'Alene Reservation shall be held forever as Indian land and as homes for the Coeur d'Alene Indians." App. 379. The agreement also provided that it would "not be binding on either party until ratified by Congress." App. 382.

Around this same time, however, concerns arose regarding the Department of Interior's policies restricting the use of Coeur d'Alene Lake by non-Indians. Around 1880, steamboats had begun using the Lake to transport people and goods between the city of Coeur d'Alene, which lay outside the Reservation, and a landing on the Coeur d'Alene River, which lay within the Reservation. Pet. App. 69. From the landing, goods were transported overland to mining camps in the upper reaches of the Coeur d'Alene River. The steamboat operators transported liquor to the mines, and sold liquor to passengers while traveling over the Lake. *Id.*; App. 52-58. When this liquor trade was discovered in 1886, the Department of

Interior moved quickly to quash the transportation of liquor across the Lake, citing statutes prohibiting the introduction of liquor into "Indian country." Pet. App. 69. Around this same time, government agents began ejecting non-Indians who were fishing and camping along the Lake and its tributaries. Pet. App. 70.[7]

Concerns over the restrictions on non-Indian use of the Lake prompted Congress to delay ratification of the 1887 agreement, in favor of investigating the situation. In 1888, the Senate passed the following resolution:

> Whereas it is alleged that the present area of the Coeur D'Alene Indian Reservation, in the Territory of Idaho, embraces 480,000 acres of land; that there are, according to the statistics in the Indian Bureau, only about 476 Indians in the tribe now occupying such reservation, or more than 1,000 acres to each man, woman, and child; that Lake Coeur D'Alene, all the navigable waters of Coeur D'Alene River, and about 20 miles of the navigable part of Saint Joseph River, and part of Saint Mary's, a navigable tributary of the Saint Joseph, are embraced within this reservation, except a shore-line of about 3 1/2 miles at the north end of the lake, it being alleged that this lake and its rivers tributary constitute the most important highways of commerce in the Territory of Idaho, and are in fact the only navigable waters, except Snake River, now used for steam-boat navigation in the Territory; that all boats now entering such waters are

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[7] According to the report of a government inspector in 1886, the steamboats would stop at several landings within the Reservation for the purpose of "putting on and taking off . . . fishing and excursionist parties, with their supplies." App. 53.

subject to the laws governing the Indian country and all persons going on such lake or waters within the reservation lines are trespassers; and

Whereas it is further alleged that the Indians now on such reservation are located in the extreme southwest corner of the same around De Smedt Mission, near the town of Farmington, in Washington Territory, where the land is good for agriculture; and it being further alleged that all that part of such reservation lying between Lake Coeur D'Alene and Coeur D'Alene River and that part between the Coeur D'Alene River and Saint Joseph River is a territory rich in the precious metals and at the same time being of no real use or benefit to the Indians: Therefore,

Resolved, That the Secretary of the Interior be, and he is hereby, directed to inform the Senate as to the extent of the present area and boundaries of the Coeur D'Alene Indian Reservation in the Territory of Idaho; whether such area includes any portion, and if so, about how much of the navigable waters of Lake Coeur D'Alene, and of Coeur d'Alene and St. Joseph Rivers; about what proportion of said reservation is agricultural, grazing and mineral land respectively; also the number of Indians occupying such reservation; also on what portion of such reservation the Indians now thereon are located; also whether, in the opinion of the Secretary, it is advisable to throw any portion of such reservation open to occupation and settlement under the mineral laws of the United States, and, if so, precisely what portion; and also whether it is advisable to release any of the navigable waters aforesaid from the limits of such reservation.

S. Misc. Doc. No. 36, 50th Cong., 1st Sess. (1888); App. 116-17.

Several weeks later, the Secretary of Interior responded by enclosing a report prepared by the Commissioner of Indian Affairs. The Commissioner's report concluded that "the reservation appears to embrace all the navigable waters of Lake Coeur d'Alene, except a very small fragment cut off by the north boundary of the reservation which runs 'in a direct line' from the Coeur d'Alene Mission to the head of the Spokane River." S. Ex. Doc. No. 76, 50th Cong., 1st Sess. 3 (1888); App. 123. The Commissioner then turned to the question of "whether it is desirable to release any of the navigable waters mentioned in the resolution from the limits of said reservation." App. 126. The Commissioner began by stating: "In approaching this question [of release of navigable waters], I deem it proper to refer briefly to the character and condition of the Indians occupying the reservation and the situation of affairs as existing amongst them." *Id.* He noted that members of the Tribe "cultivate the soil extensively, live in comfortable houses, dress like the whites, wear short hair, and in all other respects live and do as white people do. . . . They own large bands of cattle and horses and an abundance of hogs and poultry." App. 127.

The Commissioner concluded that "[t]here are few Indians in the entire country, if we except the five civilized tribes, who are as far advanced. . . . " App. 126. The Commissioner also noted that members of the Tribe did not reside by the Lake, stating his belief that "all, or nearly all" of the tribal members lived on farmlands in the Hangman's Creek area "lying south of the Lake Coeur d'Alene and St. Joseph River." *Id.* After reciting the above

facts relating to the Tribe's needs, the Commissioner concluded that the Tribe retained its original Indian title to lands within the boundaries of the Reservation:

> [M]y own opinion is that the reservation might be materially diminished without detriment to the Indians, and that changes could be made in the boundaries for the release of some or all of the navigable waters therefrom, which would be of very great benefit to the public; but this should be done, if done at all, with the full and free consent of the Indians, and they should, of course, receive proper compensation for any land so taken.
>
> Just what portion of the reservation and navigable waters should be segregated from the reservation, I am unable to say. That, I think, should be determined by negotiations with the Indians.
>
> . . . .
>
> In conclusion I will state that in my opinion these Indians have all the original Indian rights in the soil they occupy. They claimed the country long before the lines of the reservation were defined by the executive order of 1873, and the present reservation embraces only a portion of the lands to which they laid claim.
>
> . . . .
>
> I think that when the present agreement [i.e., the 1887 agreement] shall have been ratified it will be an easy matter to negotiate with them for the cession of such portions of their reservation as they do not need, including all or a portion of the navigable waters, upon fair and very reasonable terms.

App. 129-32.

Congress rejected the Commissioner of Indian Affairs' recommendation to ratify the 1887 agreement.

Instead, Congress inserted the following language in the Indian Department Appropriations Act of March 2, 1889:

> That the Secretary of the Interior be, and he is hereby, authorized and directed to negotiate with the Coeur d'Alene tribe of Indians for the purchase and release by said tribe of such portions of its reservation not agricultural and valuable chiefly for minerals and timber as such tribe shall consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress. . . .

Act of March 2, 1889, 25 Stat. 980, 1002; App. 144.

The directive to seek diminishment of the Reservation was prompted by the desire to obtain a release of at least some of the navigable waters. Pet. App. 22, n.14. The specific directions to the Secretary of Interior, however, omitted any mention of submerged lands. Act of March 2, 1889, 25 Stat. at 1002; App. 144.

Significantly, the 1889 Act was the last action that Congress took with regard to the Coeur d'Alene Reservation during the territorial period. In the summer of 1889, a group of prominent Idaho politicians met in Boise, Idaho, to draft a constitution for submission to Congress, in the hope of gaining statehood for Idaho. Their action was unusual, since Congress had not passed enabling legislation authorizing the formation of a state constitution.[8] In the absence of enabling legislation, the drafters

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[8] In the Act of February 22, 1889, Congress enabled North Dakota, South Dakota, Montana and Washington to form constitutions and state governments. 25 Stat. 676. The Act required the state constitutions to contain ordinances

looked to other enabling acts for guidance, and included standard language disclaiming title to public lands and lands owned or held by Indian tribes. Idaho Const., Art 21, § 19; App. 370-72.[9]

Despite the lack of enabling legislation, Congress approved the Idaho Constitution on July 3, 1890, and admitted Idaho into the Union as the 43rd State. Act of July 3, 1890, 26 Stat. 215. By this time, the negotiations with the Coeur d'Alene Tribe had been completed, and the results submitted to Congress for approval. The Tribe agreed to cede the northern portion of the Reservation. App. 384. The boundaries of the diminished Reservation bisected the Lake, with the southern third of the Lake remaining within the boundaries of the Reservation, while the northern two-thirds of the Lake, along with the surrounding uplands, were excluded from the Reservation. *Id.*

The 1889 agreement and the 1887 agreement were transmitted to Congress for ratification on December 18, 1889. H. R. Rep. No. 2988, 51st Cong., 1st Sess. 26 (1890); App. 373-75. The agreements were bundled as a package for consideration, partly because the Tribe had insisted on a provision stating that the 1889 agreement would not be binding on either party until ratification of the 1887 agreement. Pet. App. 8; App. 385.

Although the Senate passed a bill ratifying the 1887 and 1889 agreements on June 7, 1890, 21 Cong. Rec.

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disclaiming title to "all lands . . . owned or held by any Indian or Indian tribes." *Id.* at 677.

[9] Although the district court cited this provision as supporting its decision, Pet. App. 81-82, the court of appeals, in reaching its conclusions, expressly disclaimed any reliance on this provision. Pet. App. 24.

5769-70, App. 359-67, the House did not hold a vote on the bill that year, Pet. App. 8, and the agreements were not ratified until passage of the Indian Department's 1891 annual appropriation bill on March 3, 1891, eight months after Idaho's admission to the Union. 26 Stat. at 1027; App. 376-88.

The exterior boundaries of the Coeur d'Alene Reservation have remained the same since 1891, with one exception. In 1893, Congress authorized negotiations to purchase the townsite of Harrison, populated by non-Indians but located within the Reservation. Act of March 3, 1893, 27 Stat. 612, 616. Harrison stood on the shores of Coeur d'Alene Lake, immediately south of the mouth of the Coeur d'Alene River. The final description of the ceded lands, as negotiated with the Tribe, encompassed a one-mile rectangular strip of land that included a corner of Coeur d'Alene Lake, since the boundary of the cession descended one mile due south of the mouth of the Coeur d'Alene River, then proceeded east. Pet. App. 84-85; App. 392.

As previously discussed, the State exercised sovereignty over Coeur d'Alene Lake throughout the 20th century. It was not until 1994 that the United States sought to assert ownership of the submerged lands underlying the southern end of Coeur d'Alene Lake and the lower reaches of the St. Joe River. In its initial complaint, filed in the Federal District Court for the District of Idaho, the United States invoked federal court jurisdiction under 28 U.S.C. §§ 1331, 1345, and 2202. The Coeur d'Alene Tribe intervened, invoking federal court jurisdiction under 28 U.S.C. §§ 1331, 1345, 1346, 1362, and 1367. The State of Idaho counterclaimed, asserting sovereign title to the submerged lands put at issue by the United States. Pet. App. 32.

Following a two week trial, the federal district court, based on the historic facts set out above, concluded that the President, in setting aside the 1873 Reservation, had clearly intended to include submerged lands within the Reservation. Pet. App. 66. The court then turned to the issue of congressional ratification. The court concluded that by "authorizing the federal government to negotiate with the Tribe for a release of the submerged lands, Congress acknowledged that the Executive Order of 1873 had effectively conveyed ownership of those lands to the Coeur d'Alenes." Pet. App. 78. The court decreed that the Tribe, and the United States as trustee, were "entitled to the exclusive use, occupancy and right to the quiet enjoyment of the bed and banks of all the navigable waters within the current boundaries of the Coeur d'Alene Indian Reservation," excluding submerged lands within Heyburn State Park. App. 8.

The State appealed, and the United States Court of Appeals for the Ninth Circuit affirmed the district court's decision.[10] Pet. App. 1-30. The court of appeals applied the two-pronged test from *United States v. Alaska*, 521 U.S. 1 (1997), to determine, first, whether the executive branch intended to include the submerged lands within the Reservation, and second, whether Congress affirmatively defeated state title to the submerged lands. Because the State conceded, for purposes of appeal, that the executive branch had intended, or by 1888 had interpreted, the 1873 Executive Order Reservation to include submerged lands,

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[10] The Tribe also filed a cross-appeal relating to the district court's refusal, on Eleventh Amendment grounds, to hear the Tribe's claims to submerged lands within Heyburn State Park, which were excluded from the United States' complaint. The court of appeals affirmed the district court. Pet. App. 27-30.

the court focused on the second prong of the *Alaska* test. Pet. App. 13.

The court of appeals acknowledged that the issue under the second prong of the test is "whether the congressional action at issue showed an affirmative intent to defeat state title, that is, whether the 'intention was definitely declared or otherwise made very plain.' " Pet. App. 12. The court of appeals, however, did not identify specific statutory language plainly declaring an affirmative intent to defeat state sovereignty to submerged lands. Nor did it identify any statute conveying submerged lands to the Tribe. Rather, it concluded that "the affirmative course of action on which Congress embarked in 1889 – open-ended negotiations to purchase whatever non-agricultural land, particularly submerged lands, the Tribe was willing to cede – presupposes that beneficial ownership of all land within the 1873 reservation, including submerged lands, *had already passed to the Tribe.*" Pet. App. 23 (emphasis added).

The court of appeals also purported to adopt this Court's admonition in *Alaska* that "the purpose of a conveyance or reservation is a critical factor in determining federal intent." 521 U.S. at 39. The court of appeals, however, explicitly declined to determine the purpose of the Coeur d'Alene Reservation as understood by Congress. Pet. App. 18-19. Rather, it held that it was necessary to examine purpose only as it related to the government's goals at the time the executive branch reserved the submerged lands. *Id.*

The court of appeals issued its decision on May 2, 2000. The State of Idaho filed a petition for a writ of certiorari with this Court on July 25, 2000. The petition was granted on December 11, 2000.

SUMMARY OF ARGUMENT

It is a rare and extraordinary thing for a sovereign government to abrogate the public's ownership of lands underlying navigable waters. Submerged lands are tied in a unique way to sovereignty, precisely because their natural and primary uses are public in nature. *Shively v. Bowlby*, 152 U.S. 1, 11 (1894). Only sovereign ownership assures that submerged lands will be maintained for the benefit of the whole people. If such lands are to be removed from common public use, it must be done with deliberation, and only after full consideration of the consequences. An intent to defeat sovereign title to submerged lands must also be plainly stated, because such an important decision would not be left for inference from ambiguous language. *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 416 (1842).

For these reasons, the Court has carefully limited the circumstances under which it will infer an intent to sever submerged lands from sovereignty. While Congress, with its possession of national and municipal sovereignty over territories, may have the authority to sever submerged lands from sovereignty, and prevent their passage to future States, it has done so only in "the most unusual circumstances." *Utah Div. of State Lands v. United States*, 482 U.S. 193, 197 (1987). Within Indian reservations, an intent to defeat state sovereign title to submerged lands has been found only where Congress conveyed the lands in fee to the occupant tribe, and promised the tribe the lands would never be included within any future state. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 625 (1970). Where Congress has granted tribes rights other than full fee title, including rights of occupancy or exclusive use,

the Court has not inferred an intent to defeat state sovereign title to submerged lands within Indian reservations. *United States v. Holt State Bank*, 270 U.S. 49, 58-59 (1926); *Montana v. United States*, 450 U.S. 544, 554 (1981).

Within other types of federal reservations, an intent to defeat state title to submerged lands has been found only where Congress made the determination that state ownership would thwart the purposes for which the reservation had been established, and expressly prevented the state from assuming sovereignty and ownership over the submerged lands. *See generally United States v. Alaska*, 521 U.S. 1 (1997). Notably, in both *Choctaw Nation* and *Alaska*, the statutes in question addressed explicitly how the assumption of statehood would affect both sovereignty and title within the federal reservations at issue.

In the case of the Coeur d'Alene Indian Reservation, Congress never addressed the question of whether the future State of Idaho would be denied sovereign title to submerged lands within the Reservation. Prior to statehood, there were two congressional actions relating to submerged lands within the Reservation. The first was a Senate inquiry into allegations that steamboats on Coeur d'Alene Lake were "subject to the laws governing the Indian country and [that] all persons going on such lake or waters within the reservation lines are trespassers." App. 116-17. After being informed by the Department of Interior that it interpreted the Coeur d'Alene Indian Reservation to embrace the submerged lands of Coeur d'Alene Lake, Congress ordered negotiations to diminish the Reservation, through the purchase of lands from the Coeur d'Alene Tribe. In ordering the negotiations, however, Congress did not convey the submerged lands to the Tribe; it did not affirm the Reservation boundaries that

embraced the submerged lands; it did not direct that the public be denied access to the submerged lands or the overlying waters; and it did not address whether the submerged lands would later pass to the State as an incident of its sovereignty. Rather, Congress repudiated the Reservation as it then existed, directed its diminishment, and drafted its description of the lands to be purchased so as to avoid any implication that it was recognizing tribal title to the submerged lands. Act of March 2, 1889, 25 Stat. 980, 1002 (the "1889 Act").

In short, Congress did not "purport to defeat the entitlement of future States to any land reserved," and made "no mention of the States' entitlement to the beds of navigable rivers and lakes upon entry into statehood." *Utah Div. of State Lands*, 482 U.S. at 208. Further, neither the 1889 Act, nor its legislative history, suggest that Congress concluded that the future assumption of state sovereign title to submerged lands would thwart the purposes of the diminished Coeur d'Alene Indian Reservation. To the contrary, the language of the 1889 Act strongly implies that the primary purpose of the diminished Reservation was to provide lands to meet the agricultural needs of the Coeur d'Alene Tribe, and the legislative history described the Tribe's members as successful farmers. Thus, exclusive tribal control of submerged lands, and exclusion of the public uses associated with state sovereign title, were not necessary to fulfill the purposes of the diminished Reservation.

ARGUMENT

Submerged lands, are, by their nature, "incapable of ordinary and private occupation, cultivation, and improvement; and their natural and primary uses are

public in their nature. . . . " *Shively v. Bowlby*, 152 U.S. 1, 11 (1894). In ancient England, submerged lands were held by the King "for the benefit of the whole people." *Utah Div. of State Lands v. United States*, 482 U.S. 193, 196 (1987). Following the issuance of the Magna Carta, submerged lands became so identified with sovereignty that it was doubted whether "the king or any particular subject can gain a propriety exclusive of the common liberty." *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 412 (1842). If anything, American law ties submerged lands even more firmly to sovereignty. American law rejected the sovereign's rights of private property in submerged lands, *jus privatum*, that was recognized in England apart from the public's right to submerged lands, or *jus publicum*. *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 286 (1997). These "developments in American law are a natural outgrowth of the perceived public character of submerged lands, a perception which underlies and informs the principle that these lands are tied in a unique way to sovereignty." *Id.*

Because submerged lands are so identified with sovereignty and public use, issues involving their ownership cannot be analogized to property transactions. "Dominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a presumption against their separation from sovereignty must be indulged, in construing either grants by the sovereign of the lands to be held in private ownership or transfer of sovereignty itself." *United States v. Oregon*, 295 U.S. 1, 14 (1935). Ownership can be vested in someone other than the rightful sovereign only after affirmative steps are taken to sever the lands "from the prerogative powers of government." *Martin*, 41 U.S. (16 Pet.) at 410.

The Constitution of the United States parcels sovereignty between the States and the federal government, and so this Court, in addressing title to submerged lands, was "called upon to draw the line that separates the sovereignty and jurisdiction of the government of the union, and the state governments. . . . " *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 220 (1845). It soon became established law that within the original thirteen states, sovereign title to submerged lands was vested in the states. *Shively*, 152 U.S. at 16. Because subsequently admitted States enter the Union on an equal footing with the original thirteen states, they too are vested with title and control to submerged lands. *Utah Div. of State Lands*, 482 U.S. at 197. Each state's ownership and control of submerged lands is "an inseparable attribute of the equal sovereignty guaranteed to it upon admission [to the Union]." *United States v. Louisiana*, 363 U.S. 1, 16 (1960).

Before gaining admission, however, most western States were originally territories under the plenary control of the federal government. When the United States acquired new territories, "they took upon themselves the trust to hold the municipal eminent domain for the new states, to invest them with it, to the same extent, in all respects, that it was held by the [original states]." *Pollard*, 44 U.S. at 222-23. This trust extends to submerged lands. *See Shively*, 152 U.S. at 49 (submerged lands are held "in trust" for future states); *Montana v. United States*, 450 U.S. 544, 551 (1981) ("the Federal Government holds [submerged] lands in trust for future States"). While this trust is derived from ancient principles defining the very nature of sovereignty, the Constitution does not prohibit the United States from breaching the trust. The United States "have the entire dominion and sovereignty,

national and municipal, Federal and state, over all the territories, so long as they remain in a territorial condition." *Shively*, 152 U.S. at 48. The possession of both national and municipal sovereignty over a territory vests Congress with the authority to sever submerged lands from sovereignty, and prevent them from passing to future States formed out of the territory. *Id.*

While Congress can abrogate its responsibility to hold submerged lands in trust for future States, it has done so "only in the most unusual circumstances." *Utah Div. of State Lands*, 482 U.S. at 197. Firm congressional policy has been that submerged lands "shall not be granted away during the period of territorial government . . . unless in case of some international duty or public exigency." *Shively*, 152 U.S. at 50. This policy has consistently informed this Court's interpretation of congressional actions alleged to defeat state title to submerged lands: "[D]isposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926).

Further, Congress' authority to defeat state title to submerged lands is strictly limited to the period during which Congress exercises municipal sovereignty over a territory. Upon a state's admission, "the title of the United States to lands underlying navigable waters within the State passes to it, as incident to the transfer to the State of local sovereignty. . . . " *United States v. Oregon*, 295 U.S. at 14. Once vested, state title to submerged lands is absolute and cannot be defeated. *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977).

This Court's most recent cases have emphasized that defeats of state title to submerged lands are to be found only in exceptional circumstances. The court of appeals examined what it called this Court's "trilogy of decisions" in *United States v. Alaska*, 521 U.S. 1 (1997), *Utah Division of State Lands v. United States*, 482 U.S. 193 (1987), and *Montana v. United States*, 450 U.S. 544 (1981). It is more revealing, however, to expand the analysis to include *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), wherein the Court found a defeat of state title. Together, the four decisions identify the factors that have led to a defeat of state title to submerged lands, and the factors, or lack thereof, that have led to the opposite conclusion.

In *Choctaw Nation*, the Court held that the United States had conveyed the bed of the Arkansas River to the Choctaw Nation. The factors the Court identified in its decision included the fact that the tribe was granted a fee simple patent to its lands. *Id.* at 625. The patent made an express reference to the "main channel of the Arkansas river" as a boundary. *Id.* at 630. Most importantly, the treaty pledged that the Nation would enjoy the "jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation . . . and that no part of the land granted to them shall ever be embraced in any Territory or State." *Id.* at 625, quoting Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333-34.

In later submerged lands decisions, the Court described the decision in *Choctaw Nation* as a "singular exception," and traced the outcome in large part to "the Government's promise that the reserved lands would never become part of any State," and the fact that the

Nation was promised "freedom from state jurisdiction." *Montana*, 450 U.S. at 555 n.5. The Court later stated that "indispensable to the holding [in *Choctaw Nation*] was a promise to the Indian Tribe that no part of the reservation would become part of a State." *Utah Div. of State Lands*, 482 U.S. at 198.

The next submerged lands case taken up by the Court was *Montana*, wherein the Crow Tribe claimed ownership of the beds and banks of the Big Horn River. There, as was the case in *Choctaw Nation*, the boundaries of the reservation were described by reference to the mid-channel of a navigable river.[11] The Crow Tribe, however, was not expressly promised that its lands would never be embraced within a future state. Rather, it was promised that its reservation was set apart "for the absolute and undisturbed use and occupation" of the Tribe. *Montana*, 450 U.S. at 548. Distinguishing *Choctaw Nation*, this Court held that:

> The treaty in no way expressly referred to the riverbed, *Packer v. Bird*, 137 U.S., at 672, nor was an intention to convey the riverbed expressed in "clear and especial words," *Martin v. Waddell*, 16 Pet., at 411, or "definitely declared or otherwise made very plain," *United States v. Holt State Bank*, 270 U.S., at 55. Rather, as in *Holt*, "[t]he

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[11] Article 2 of the Fort Laramie Treaty of May 7, 1868, 15 Stat. 649, described the boundary of the Crow Reservation as running up the 107th meridian "to the mid-channel of the Yellowstone River; thence up said mid-channel to the point where it crosses the said southern boundary of Montana. . . . " 2 Charles J. Kappler, *Indian Affairs: Laws and Treaties* 1008 (1904). This portion of the Yellowstone River has been found to be navigable. *Edwards v. Sēverin*, 785 P.2d 1022, 1023-24 (Mont. 1990).

> effect of what was done was to reserve in a general way for the continued occupation of the Indians of what remained of their aboriginal territory." *Id.*, at 58.

450 U.S. at 554. The Court also found that "the situation of the Crow Indians at the time of the treaties presented no 'public exigency' that would have required Congress to depart from its policy of reserving ownership of beds under navigable waters for the future States," because "at the time of the treaty the Crows were a nomadic tribe dependent chiefly on buffalo, and fishing was not important to their diet or way of life." *Id.* at 556.

Six years after *Montana*, the Court again addressed the issue of title to submerged lands within a federal reservation in *Utah Div. of State Lands*. The situation addressed in *Utah Div. of State Lands* was unique, since it involved a reservation set aside for the specific purpose of preserving a navigable lake as a potential reservoir site. 482 U.S. at 199. Further, no third party was involved, so the only issue was whether the reservation of submerged lands would defeat state title. To answer the question, the Court began by noting that when the federal government reserves submerged lands, it "may not also intend to defeat a future State's title to the land" because the "land remains in federal control, and therefore may still be held for the ultimate benefit of future States." *Id.* at 202. Thus, the Court held, "we would not infer an intent to defeat a State's equal footing entitlement from the mere act of reservation itself." *Id.*[12] Rather,

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[12] Notably, in support of the proposition that an intent to allow the State obtain title to submerged lands within a federal reservation "would not be unusual," this Court cited decisions addressing submerged lands within Indian reservations, namely, *Montana* and *Holt State Bank*. 482 U.S. at 202.

the Court formulated a two prong test to address alleged defeats of state title arising from reservations of submerged lands. The Court held that "the United States would not merely be required to establish that Congress clearly intended to include land under navigable waters within the federal reservation; the United States would additionally have to establish that Congress affirmatively intended to defeat the future State's title to such land." *Id.*

While the Court went on to hold, under the first prong, that there was no intent to include the submerged lands within the reservation in question, it also applied the second prong, holding that "Congress did not clearly express an intention to defeat Utah's claim to the lakebed under the equal footing doctrine upon entry into statehood." *Id.* at 208. In support of its holding, the Court identified three factors. First, the Act in question did not "purport to defeat the entitlement of future States to any land reserved," but merely reserved land from sale, entry, settlement or occupation. *Id.* Second, the Act made "no mention of the States' entitlement to the beds of navigable rivers and lakes upon entry into statehood." *Id.* Third, the transfer of the lakebed to the State would not defeat the purpose of the reservation, which was to develop a reservoir or water reclamation project at the lake. *Id.*

In this Court's most recent submerged lands decision, *United States v. Alaska*, the Court turned once again to the question of state title to submerged lands within a federal reservation. This time, however, the submerged lands in question had originally been reserved or set aside by the executive branch, not Congress. The Court employed the two prong test used in *Utah Div. of State Lands*, requiring a clear intent to include submerged lands

within the federal reservation, and an affirmative expression of intent to defeat the future state's title to such land. *Alaska*, 521 U.S. at 41. For the two reservations in question, the Court concluded that the first prong of the test was met, since the executive branch had clearly intended to include submerged lands within the reservations. *Id.* at 39-40, 55. The decisive question presented to the Court was whether Congress had taken additional actions that affirmatively defeated state title to submerged lands within the two areas reserved or set aside by the executive branch.

The first reservation addressed in *Alaska* was a national petroleum reserve. After finding that the executive branch had intended to include submerged lands within the reserve, the Court turned to the question of whether Congress intended to defeat state title to the submerged lands. The Court found such intent in § 11(b) of the Alaska Statehood Act. *Alaska*, 521 U.S. at 44. Section 11(b) provided that the United States would have the "power of exclusive legislation . . . as provided by [the Enclave Clause of the Constitution, Art. I, § 8, cl. 17] over such tracts or parcels of land as, immediately prior to the admission of said State, are owned by the United States and held for military . . . purposes, including naval petroleum reserve numbered 4 [the National Petroleum Reserve]." *Alaska*, 521 U.S. at 41. The Court concluded that Section 11(b), "which noted that the United States owned the Reserve and which included a statement of exclusive legislative jurisdiction under the Enclave Clause, reflected Congress' intent to ratify the inclusion of submerged lands within the Reserve and to defeat the State's title to those lands." *Id.* at 46.

In interpreting Section 11(b), the Court also relied heavily upon the purpose of the Reserve, which was to secure ownership of valuable oil deposits. *Id.* at 40. The Court noted that ownership of submerged lands was "necessary to prevent the Reserve's petroleum resources from being drained from beneath submerged lands." *Id.* at 42. In light of this fact, the Court concluded:

> [D]efeating state title to submerged lands was necessary to achieve the United States' objective – securing a supply of oil and gas that would necessarily exist beneath uplands and submerged lands. The transfer of submerged lands at statehood – and the loss of ownership rights to the oil deposits beneath those lands – would have thwarted that purpose.

Id. at 42-43.[13]

The second set of submerged lands addressed in *Alaska* was within the boundaries of an area withdrawn and set apart as a wildlife refuge, pursuant to an application submitted to the Secretary of Interior by the Bureau of Sport Fisheries and Wildlife. *Id.* at 46.[14] After finding that the withdrawal was intended to include submerged lands that served as wildlife habitat, the Court addressed whether Congress had affirmatively defeated state title to the submerged lands. The Court found such intent in § 6(e) of the Alaska Statehood Act. Section 6(e) addressed the circumstances under which Alaska would assume

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[13] The Court had earlier examined purpose as it related to the executive intent to include the submerged lands within the reservation. 521 U.S. at 39-40.

[14] At the time of statehood, the application was still pending. Department of Interior regulations in force at that time set such lands apart pending final approval of the application. 521 U.S. at 57-58.

sovereignty over fish and wildlife management. It provided that the federal government would retain "administration and management of the fish and wildlife resources of Alaska" until the Secretary of Interior certified to Congress "that the Alaska State Legislature has made adequate provision for the administration, management, and conservation of said resources in the broad national interest." Pub. L. 85-508, 72 Stat. 339, 340-41. The Act also provided that:

> All real and personal property of the United States situated in the Territory of Alaska which is specifically used for the sole purpose of conservation and protection of the fisheries and wildlife of Alaska . . . shall be transferred and conveyed to the State of Alaska by the appropriate federal agency; Provided . . . That such transfer shall not include lands withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife. . . .

Id. at 340-41.

Based on this strong language, the Court inferred an intent to defeat state title to submerged lands. It held that "Section 6(e) of the Alaska Statehood Act expressly prevented land that has been 'set apart as [a] refug[e]' from passing to Alaska." 521 U.S. at 61. It further concluded that "[i]n § 6(e) of the Statehood Act, Congress clearly contemplated continued federal ownership of certain submerged lands . . . so long as those submerged lands were among those 'withdrawn or otherwise set apart as refuges or reservations for the protection of wildlife.' " *Id.* at 57. The only real issue was whether the refuge in question included submerged lands. Here, the Court turned to the purpose of the Reservation. It held that "waters within the boundaries of the Range were an

essential part of the habitats of the species the Range was designed to protect, and [the] retention of lands underlying those waters was critical to the Government's goal of preserving these aquatic habitats." *Id.* at 52. Because "[t]he 1957 application to create the wildlife refuge clearly encompassed submerged lands," *id.* at 61, the Court concluded that "the operative provision of the Alaska Statehood Act, § 6(e), reflects a very clear intent to defeat state title." 521 U.S. at 57.

The common thread running through the cases where this Court has found a defeat of state title to submerged lands is an unmistakable expression of congressional intent that the lands in question would not be subject to state sovereignty. In *Choctaw*, the Tribe was expressly promised at the time of treaty-making that no part of the reservation would become part of a state. Twice, this Court has emphasized this promise was indispensable to the holding in *Choctaw*. *Utah Div. of State Lands*, 482 U.S. at 198, *Montana*, 450 U.S. at 555 n.5.

In *Alaska*, Congress asserted Enclave Clause jurisdiction over the petroleum reserve, establishing that it was not just reserving proprietary rights to itself, but was denying the assumption of state sovereignty over lands within the reserve. *Alaska*, 521 U.S. at 46. For the wildlife refuge, Congress expressly prevented all lands within the refuge from passing to the State upon its admission. Importantly, the provision was made in the context of § 6(e) of the Alaska Statehood Act, which addressed the general assumption of state sovereignty over fish and game resources and the lands and property related to the assumption of such sovereignty.

In short, a defeat of state title to submerged lands within federal reservations has been found only where it

was clear, from the language and context of the statute in question, that Congress contemplated the effects of its action on the assumption of state sovereignty over submerged lands. Where the statute in question simply conveyed or reserved property rights, rather than allocating rights of sovereignty, no defeat of state title to submerged lands has been found. This principle is not new; in fact, it was applied in one of this Court's earliest submerged lands decisions, *Martin v. Waddell's Lessee*. There, the Court, describing the history of the State of New Jersey, found that during the colonial period, all sovereign and proprietary rights had been conveyed from King Charles II to the Duke of York, and then to the Proprietors of East New Jersey. 41 U.S. (16 Pet.) at 407. In 1702, the Proprietors of East New Jersey surrendered all rights of government and sovereignty to Queen Anne, explicitly retaining all rights of private property. *Id.* at 407, 415-16. The Court held that the surrender of sovereignty carried with it title to submerged lands, despite the express retention of all property rights. *Id.* at 416. The Court stated:

> [I]f the great right of dominion and ownership in the rivers, bays and arms of the sea, and the soils under them, were to have been severed from the sovereignty, and withheld from the crown; if the right of common fishery for the common people . . . was intended to be withdrawn, the design to make this important change in this particular territory would have been clearly indicated by appropriate terms; and would not have been left for inference from ambiguous language.

41 U.S. (16 Pet.) at 416.

By the same token, in order to find that the federal government has defeated state title to submerged lands within a federal Indian reservation, the government must

do more than retain property rights for itself or the occupant tribe. Congress must affirmatively intend to sever the submerged lands from future state sovereignty and dedicate the lands to federal or tribal uses which would be thwarted if the lands were subject to state sovereignty. An intent to defeat state title must also be definitely declared or otherwise made plain: because of the importance of submerged lands to sovereignty, and their dedication to public use, an intent to sever submerged lands from sovereignty "would not have been left for inference from ambiguous language." *Martin*, 41 U.S. at 416.

In the case of the Coeur d'Alene Indian Reservation, there is no evidence that Congress exercised its municipal sovereignty over the Territory of Idaho to sever the submerged lands of Coeur d'Alene Lake and the St. Joe River from sovereignty and convey them to the Coeur d'Alene Tribe for its proprietary use. Nor is there any reason to conclude that Congress severed the submerged lands from state sovereignty and dedicated them to the exclusive use of the federal government.

Up to the point of Idaho's admission, Congress passed three acts specifically addressing property rights within the Coeur d'Alene Reservation. The first was the Act of May 15, 1886, 24 Stat. at 44, which authorized negotiations with the Coeur d'Alene Tribe for the purchase of its lands outside the limits of the 1873 Executive Order Reservation. The second was the Act of May 30, 1888, 25 Stat. 160, which authorized a railroad right-of-way across the 1873 Reservation. The third was the Act of March 2, 1889, 25 Stat. at 1002, which authorized the purchase of certain lands within the 1873 Reservation. The 1889 Act was the last action Congress took with

respect to the Coeur d'Alene Reservation before passage of the Idaho Statehood Act, which accepted the terms of Idaho's constitution and admitted Idaho to the Union. Act of July 3, 1890, 26 Stat. 215. It is informative to review each of the above Acts in turn, comparing each to the congressional acts reviewed in this Court's submerged lands decisions.

The Act of May 15, 1886.

Little need be said about the 1886 Act, since neither the district court nor the court of appeals interpreted the 1886 Act as defeating state sovereign title to submerged lands. Indeed, the 1886 Act did nothing but authorize negotiations "with the Coeur d'Alene Indians for the cession of their lands outside the limits of the present Coeur d'Alene Reservation to the United States. . . . " Act of May 15, 1886, 24 Stat. at 44; App. 50. Nothing on the face of the Act implies an intent to defeat, or even address, state sovereign title to submerged lands within the reservation. Additionally, Congress made plain its intent that the 1886 Act was not to be construed as taking any final action with regard to the Tribe's lands, by providing that "no agreement made shall take effect until ratified by Congress." App. 50.

The Act of May 30, 1888.

Likewise, little need be said about the 1888 Act, which granted an "extension of [a] railroad through the lands in Idaho Territory set apart for the use of the Coeur d'Alene Indians by executive order, commonly known as the Coeur d'Alene Indian Reservation. . . . " Act of May 30, 1888, 25 Stat. 160; App. 137. The court of appeals did not specifically identify the 1888 Act as defeating state title to submerged lands, holding only that Congress' passage of the Act "supports congressional recognition of

the 1873 reservation, which Congress by this point knew included submerged lands." Pet. App. 21 n.13. Beyond recognizing the existence of the 1873 reservation, however, the 1888 Act does not purport to defeat state title to submerged lands, or otherwise convey or reserve such lands. The Act does mention Coeur d'Alene Lake and the St. Joe River, but only as geographic points describing the location of the railroad right-of-way, which crossed the Lake.

The Act of March 2, 1889.

The congressional action that received the primary attention of the court of appeals was the 1889 Act, which authorized negotiations for a cession of a portion of the 1873 Reservation. The court paid particular attention to the Act's legislative history. The history of the 1889 Act started with Congress' consideration of the 1887 agreement, which would have confirmed the 1873 boundaries. Pet. App. 21. As part of its consideration of the 1887 agreement, Congress attempted to ascertain, through an inquiry to the Department of Interior, whether the Coeur d'Alene Reservation included submerged lands. *Supra* at 10-12; App. 116. In response, the Department of Interior submitted a report to Congress stating that the Coeur d'Alene Reservation "appears to embrace all the navigable waters of Lake Coeur d'Alene," with the exception of a small fragment at the extreme north end of the Lake. App. 123. The court of appeals held that the report put Congress on notice that the executive branch construed the 1873 Reservation to include submerged lands. Pet. App. 21.

The court of appeals attached significance to the fact that "[a]lthough Congress had the opportunity and the power to repudiate the executive reservation and the

1887 agreement, it did not do so." Pet. App. 15. Instead, Congress authorized cession negotiations for the "purchase and release by said tribe of such portions of its reservation . . . as such tribe shall consent to sell." Act of March 2, 1889, 25 Stat. at 1002, App. 144. The court of appeals held:

> The express reference to the reservation as *the Tribe's reservation*, explicit recognition that the choice to sell was the Tribe's, and reference to *tribal release* of portions of *its reservation* all manifest an awareness and acceptance by Congress of the boundaries of the 1873 reservation – boundaries that included submerged lands.
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> . . . .
>
> Although Congress may have been unhappy to learn that the executive reservation included submerged lands, its actions show recognition and acceptance of the passage of beneficial ownership to the Tribe, for it sought to *regain* as much submerged land as possible. The affirmative course of action on which Congress embarked in 1889 – open-ended negotiations to purchase whatever non-agricultural land, particularly submerged lands, the Tribe was willing to cede – presupposes that beneficial ownership of all land within the 1873 reservation, including submerged lands, had already passed to the Tribe.

Pet. App. 22-23 (emphasis in original).

1. The court of appeals, by holding that Congress did not "repudiate" the 1873 Executive Order Reservation, simply mischaracterized Congress' actions. Congress not only repudiated the 1873 Reservation, but such repudiation was the underlying purpose of the 1889 Act. The very reason that Congress required renewed negotiations

was Congress' refusal to accept the Reservation boundaries established in the 1873 Executive Order and the 1887 agreement.

The court of appeals was correct in one respect: Congress had the authority to repeal the 1873 Executive Order if it chose to do so. Executive orders do not vest the occupant tribe with compensable title, but only a right of permissive occupancy akin to a tenancy at will. *Confederated Bands of Ute Indians v. United States*, 330 U.S. 169, 176 (1947). It is not surprising, however, that Congress chose not to repeal the 1873 Executive Order. An outright repeal of the Order would have left the Tribe's farmlands unprotected. A repeal also would not have resolved outstanding claims of aboriginal title within the boundaries of the Reservation. As the Commissioner of Indian Affairs noted in his 1888 Report, it was the Indian Department's position that "these Indians have all the original Indian rights in the soil they occupy" and that such rights predated the 1873 Executive Order. App. 131.

Given the above concerns, Congress chose to repudiate the 1873 Reservation, and its inclusion of submerged lands, by refusing to accept the existing Reservation boundaries, and directing further negotiations that would result in a radical diminishment of the Reservation. Congress' action can be characterized as an "acceptance" of the 1873 Reservation only through the most twisted application of logic.

2. The holding of the court of appeals cannot be reconciled with this Court's submerged lands decisions. As discussed above, this Court has inferred an intent to defeat state title to submerged lands only where Congress, by a definite declaration or plain statement of

intent, severs submerged lands from future state sovereignty and dedicates them to specific federal or tribal uses. The 1889 Act simply has no comparison to the strong language that led to defeats of state title in *Choctaw Nation* and *Alaska*. Unlike *Choctaw Nation*, there is no language promising that Reservation lands would never be part of a future state, or otherwise severing submerged lands within the Coeur d'Alene Reservation from future state sovereignty. The 1889 Act was a repudiation of the 1873 boundaries, and an authorization to negotiate new boundaries; nothing more. There is no basis for concluding that Congress intended to defeat future state sovereignty over submerged lands. Indeed, there is no indication on the face of the Act, or in its legislative history, to indicate that Congress gave any thought to the effect its actions may have on future state sovereign title to submerged lands.

The 1889 Act is also distinguished from the provisions reviewed in *Alaska*. In both of the provisions reviewed in *Alaska*, Congress plainly stated its intent to prevent the assumption of state sovereignty over the reservations at issue. *See Alaska*, 521 U.S at 41 (discussing assertion of exclusive Enclave Clause jurisdiction over petroleum reserve); Pub. L. 85-508, 72 Stat. at 340-41 (discussing state assumption of sovereignty over fish and wildlife management and ownership of associated properties). Nothing in the 1889 Act compares to the language reviewed in *Alaska*. No provision in the Act limits the future assumption of state sovereignty over the Coeur d'Alene Reservation. As such, the operative language is analogous to that reviewed in *Utah Div. of State Lands*, since it did not "purport to defeat the entitlement of

future States to any land reserved," and made "no mention of the States' entitlement to the beds of navigable rivers and lakes upon entry into statehood." 482 U.S. at 208. In short, the 1889 Act lacks any indication that Congress intended to address the issue of whether submerged lands within the Reservation would be subject to future state sovereignty. In the absence of such evidence, it cannot be reliably concluded that Congress intended to defeat state sovereign title to submerged lands.

3. The court of appeals also failed to appreciate the significance of the fact that the 1889 Act lacked any express reference to submerged lands. The operative language of the Act merely directed the Secretary of Interior to "negotiate with the Coeur d'Alene tribe of Indians for the purchase and release by said tribe of such portions of its reservation not agricultural and valuable chiefly for minerals and timber as such tribe shall consent to sell. . . . " 25 Stat. at 1002; App. 144. The lack of an express reference to submerged lands is especially revealing. As the court of appeals noted, the Act was prompted by Congress' displeasure upon learning that the Department of Interior interpreted the Reservation to embrace submerged lands. Pet. App. 23. Yet, in the 1889 Act, Congress failed to list submerged lands among the lands to be purchased.

The omission of any mention of submerged lands in the 1889 Act could not be anything other than purposeful. The most natural reading of the omission is that Congress understood that the submerged lands were part of the regalia of sovereignty, and not subject to tribal ownership or disposal. Rather, Congress limited its express recognition of tribal property rights to the uplands adjacent to the Lake. Such a limitation reflects the understanding

that the lake was a public highway whose use was limited by tribal ownership of the adjacent uplands, which were necessary to construct the landings and shore facilities needed to make the Lake useful as a highway of commerce.[15]

The fact that the language in the 1889 Act applied only to uplands is analogous to the situation addressed in *Utah Div. of State Lands*. There, the Court held that the language of withdrawal was necessarily limited to uplands otherwise open to settlement. 482 U.S. at 203. The intent to limit the withdrawal to uplands was only affirmed by the fact that the federal purpose of developing Utah Lake as a reservoir was fully met by the reservation of title to adjacent uplands, and did not require defeat of public title to the lakebed. 482 U.S. at 206-08. Here, Congress' purpose of securing public use of the Lake did not require recognizing tribal title to the lakebed, since its purpose was fully met by acquiring tribal title to adjacent uplands. Indeed, it would have been incongruous for Congress to affirmatively defeat public title to the Lake for the sole purpose of purchasing it back from the Tribe. Congress therefore declined to expressly recognize tribal title to the lakebed.

---

[15] Congress' refusal to recognize tribal title to submerged lands was consistent with the fact that at this point in history, the prevailing law was this Court's decision in *Pollard v. Hagan*, which held that Congress could not defeat state title to submerged lands. *Pollard*, 44 U.S. (3 How.) at 28-29. It was not until the 1894 decision in *Shively v. Bowlby* that the Court confirmed the power of Congress to defeat future state title to submerged lands during the period of territorial government. 152 U.S. at 48.

Similar omissions of express references to submerged lands have figured prominently in this Court's past decisions. *See Montana*, 450 U.S. at 554 ("[t]he treaty in no way expressly referred to the riverbed"); *Utah Div. of State Lands*, 482 U.S. at 203 ("[t]he words of the 1888 Act did not necessarily refer to lands under navigable waters"). In short, an express reference to lands under navigable waters is crucial to the determination that Congress definitely declared or otherwise made plain its intent to defeat state title to the submerged lands. This rule is of especial application to the 1889 Act, where the executive branch had construed the Reservation boundaries to embrace submerged lands, and Congress' response was to order the purchase of certain uplands and the negotiation of new boundaries. If Congress had intended to recognize and affirm tribal title to the lakebed, it would have naturally included the Lake in the description of the lands to be acquired.

4. It is beyond question that the 1889 Act did not convey any lands to the Coeur d'Alene Tribe. At most, Congress recognized the Tribe's pre-existing rights of exclusive use and occupancy, and directed the purchase of those rights. *See Confederated Bands of Ute Indians v. United States*, 330 U.S. 169, 176 (1947) (holding that Indian reservations set aside by executive orders vest the occupant tribes with rights of permissive occupancy). In fact, this conclusion is implicit in the court of appeals' holding that Congress was directing the purchase of lands that "had already passed to the Tribe." Pet. App. 23.

Congress' recognition that the Tribe held an exclusive right of occupancy to lands within the Reservation, however, does not imply that Congress intended to sever submerged lands within the Reservation from future state

sovereignty. In this Court's decisions addressing title to submerged lands within Indian reservations, a defeat of state title has been inferred only where Congress explicitly granted or conveyed the submerged lands to the occupant Tribe in fee. *Choctaw*, 397 U.S. at 635. Where the Act in question granted or recognized tribal rights of exclusive use or occupancy, no defeat of state title has been found.

For example, in *Holt State Bank*, the Court was asked to determine title to the submerged lands underlying Mud Lake on the Red Lake Indian Reservation. 270 U.S. at 52. The Court deemed it significant that lands within the Reservation had never been formally granted to the Tribe, nor had the rights of the Indians been affirmatively declared. *Id.* at 58. Rather, what had been done was to "reserve in a general way for the continued occupation of the Indians what remained of their aboriginal territory. . . . " *Id.* The Court held that this recognition of the aboriginal right of occupancy was insufficient to deny the State sovereign title to the submerged lands of Mud Lake, since there was nothing in the recognition that "even approaches a grant of rights in lands underlying navigable waters. . . . " *Id.* at 58-59.

In *Montana*, there was a ratified treaty setting apart lands for the exclusive use of the Tribe, but the Court analogized the Tribe's rights in reservation lands to those recognized in *Holt State Bank*: "[A]s in *Holt*, '[t]he effect of what was done was to reserve in a general way for the continued occupation of the Indians what remained of their aboriginal territory.' " 450 U.S. at 554, *quoting Holt State Bank*, 270 U.S. at 58. Again, the right of occupancy, even though permanent and exclusive, was held insufficient to defeat sovereign title to submerged lands, since it

did not amount to a conveyance of the riverbed in clear and especial words. *Id.*

Together, *Holt State Bank* and *Montana* establish that the United States' recognition of a tribal right of exclusive use and occupancy does not imply an intent to defeat the future assumption of state sovereignty over submerged lands. There must be more. In the 1889 Act, however, there was nothing more. Congress conveyed no property rights to the Tribe; it simply authorized the purchase of the Tribe's existing rights of occupancy. Indeed, Congress took care to assure that its action would not be construed as granting the Tribe any recognizable rights until it had an opportunity to review and approve the results of the negotiations it authorized. *See* Act of May 15, 1886, 24 Stat. at 44 ("no agreement made shall take effect until ratified by Congress"); Act of March 2, 1889, 25 Stat. at 1002 ("which purchase shall not be complete until ratified by Congress"). App. 51, 144.

In short, the 1889 Act, at most, recognized existing tribal rights of occupancy within the Reservation, and then only until the completion of negotiations to purchase the timber and mineral lands. As in *Holt State Bank* and *Montana*, this recognition of the Tribe's continued occupation of what remained of their aboriginal territory did not amount to a grant or conveyance sufficient to infer an intent to defeat state title to submerged lands within the Reservation.

5. Because the 1889 Act contains no plain statement of intent to defeat state title to submerged lands, no further inquiry is needed. But, if the Court were to look beyond the plain language of the Act, as did the court of appeals, the purpose of the Reservation would be a critical factor

in determining whether a defeat of state title is implied by the terms of the Act. *See Alaska*, 521 U.S. at 52 (noting that in prior submerged lands decisions, the Court "focused on the purpose of the conveyance or reservation as a critical factor in determining congressional intent"). Defeats of state title to submerged lands within federal reservations have been found only where the assumption of state title would have thwarted the purpose of the reservation.

For example, in *Choctaw Nation*, state title to submerged lands could not be reconciled with the stated purpose of the Treaty of Dancing Rabbit Creek, which was to guarantee the Nation exclusive sovereignty over its lands, and forbid the inclusion of those lands in any future state. *Choctaw Nation*, 397 U.S. at 625. In *Alaska*, state ownership would have thwarted the government objectives of retaining exclusive federal sovereignty over petroleum reserves and aquatic wildlife habitat. 521 U.S. at 43 ("[t]he transfer of submerged lands at statehood – and the loss of ownership rights to the oil deposits beneath those lands – would have thwarted that purpose [of securing a supply of oil and gas"]); *id.* at 52 ("waters within the boundaries of the Range were an essential part of the habitats of the species the Range was designed to protect, and . . . retention of lands underlying those waters was critical to the Government's goal of preserving these aquatic habitats").

In the case of the Coeur d'Alene Indian Reservation, neither of the lower courts bothered to determine the purposes of the Reservation as understood by Congress, nor did they explain how the purposes of the Reservation would be thwarted by state ownership of submerged lands. The court of appeals determined there was no need

"that Congress apprehend the purpose of the reservation at the time it takes action recognizing the executive reservation." Pet. App. 18 n.11. Thus, the court limited its discussion of purpose to the finding that when establishing the reservation by executive order, "the government's negotiators and agents were aware of the Tribe's dependence on fishing in 1873." Pet. App. 19.

The court of appeals' failure to explore the purposes of the Reservation, as understood by Congress, is indefensible. The 1889 Act was not an affirmation of the 1873 Executive Order Reservation or its purposes; it was a mandate to radically alter the Reservation to meet the changing needs of the Tribe. As such, examination of the purposes of the altered Reservation is required to fully understand congressional intent.

The purposes of the altered Reservation are easily discerned on the face of the 1889 Act. Although the language is directed toward the purchase of certain lands, Congress' objectives for the continuing Reservation are also evident. Congress directed the Secretary of Interior to negotiate with the Tribe for the purchase and release of "such portions of its reservation not agricultural and valuable chiefly for minerals and timber. . . . " 25 Stat. at 1002; App. 144. The express language of the Act directs the Secretary of Interior to protect the Tribe's agricultural lands, reflecting the fact that the primary purpose of the continuing Reservation was to protect the Tribe's agricultural activities.

The fact that Congress' primary purpose for the new Reservation was to protect the Tribe's agricultural land is supported by the legislative history. The reports submitted to Congress in relation to the 1887 agreement uniformly portrayed the Coeur d'Alene Indians as farmers.

The commission that negotiated the 1887 agreement reported that "[t]he reservation is one of the best we have visited . . . [t]he Indians have good productive farms, good houses, barns, gardens, horses, hogs, cattle, domestic fowls, wagons, agricultural implements of the latest patterns, and indeed everything found on flourishing farms." S. Ex. Doc. No. 14, 51st Cong., 1st Sess. 50 (1889); App. 217.

In 1888, the Commissioner of Indian Affairs, in responding to the Senate's inquiry regarding Coeur d'Alene Lake, affirmed the Tribe's reliance on agriculture, and added that "[t]here are few Indians in the entire country, if we except the five civilized tribes, who are as far advanced. . . . " S. Ex. Doc. No. 76, 50th Cong., 1st Sess. 5 (1888); App. 126. Given this legislative history, and the express language in the 1889 Act, Congress clearly anticipated that after the diminishment of the Coeur d'Alene Reservation, the primary purpose of the Reservation would be to provide the lands necessary to sustain the Tribe's agricultural efforts.

Even assuming, for purposes of argument, that the purpose of the reduced Reservation was to provide fishing opportunities for the Coeur d'Alene Tribe, such a purpose is not necessarily incompatible with state sovereignty over submerged lands. Federal protection of tribal fishing rights does not imply the exclusion of state sovereignty over natural resources. Indian hunting and fishing rights "can coexist with state management of natural resources." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999). The Court has "repeatedly reaffirmed state authority to impose reasonable and

necessary nondiscriminatory regulations on Indian hunting, fishing, and gathering rights in the interest of conservation." *Id.* at 205. State authority over hunting and fishing by tribal members extends to lands within the boundaries of Indian reservations. *Puyallup Tribe, Inc. v. Washington Dept. of Game,* 433 U.S. 165, 175-77 (1977).

The recognition that States may regulate treaty hunting and fishing when necessary for conservation "accommodates both the State's interest in management of its natural resources and the [tribe's] federally guaranteed treaty rights." *Minnesota,* 526 U.S. at 205. By employing such a standard, "treaty rights are reconcilable with state sovereignty over natural resources." *Id.* Thus, state sovereignty over submerged lands and federal protection for tribal fisheries are not irreconcilable, distinguishing this case from *Alaska,* where state ownership of submerged lands would have thwarted the primary purposes of the reservations.

The Act of July 3, 1890.

The final action Congress took with regard to Indian reservations within the Idaho Territory was the Act admitting Idaho to the Union. Act of July 3, 1890, 26 Stat. 215. Although there was no specific mention of the Coeur d'Alene Reservation, the Act affirms the following provision in the Idaho Constitution:

> And the people of the state of Idaho do agree and declare that we forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indians or Indian tribes; and until the title thereto shall have been extinguished by the United States, the same shall be subject to the disposition of the United States, and said Indian

> lands shall remain under the absolute jurisdiction and control of the congress of the United States. . . .

Idaho Const., Art. 21, § 19.

The court of appeals did not read this provision as a defeat of state title to the submerged lands at dispute here, but it did cite the provision as "weigh[ing] in favor of the conclusion we have reached, for it disclaims title to land 'held by' Indians." Pet. App. 24.

The court of appeals' conclusion, however, presupposes that Congress had, prior to statehood, affirmatively acted to defeat state title to submerged lands. On its own, the provision cannot be read as a defeat of state title to submerged lands within the boundaries of the Coeur d'Alene Indian Reservation. As this Court has repeatedly recognized, during the territorial period, submerged lands within the boundaries of Indian reservations are held in trust for future States, unless Congress takes affirmative action to defeat state title to the submerged lands prior to the State's admission. *Montana*, 450 U.S. at 551.

The language of Article 21, Section 19 of the Idaho Constitution merely disclaims title to lands owned or held by Indian tribes. It does not alter tribal title or convey any interests not already held. Thus, in the absence of a pre-statehood act that defeated state title to submerged lands within the Coeur d'Alene Indian Reservation, those lands, at the point of statehood, continued to be held by the United States in trust for the State of Idaho, and were not "held by any Indians or Indian tribes." Given that fundamental fact, the disclaimer provision in the Idaho Constitution does not affect the issues before the Court.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted.

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In The

Supreme Court of the United States

STATE OF IDAHO,

Petitioner,

v.

UNITED STATES OF AMERICA and
COEUR D'ALENE TRIBE,

Respondents.

**On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

BRIEF OF THE STATES OF CALIFORNIA, ALABAMA, ALASKA, ARKANSAS, NORTH DAKOTA, OREGON, SOUTH DAKOTA, UTAH, VERMONT, WASHINGTON AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI STATES

Throughout the country, navigable rivers and lakes provide highways of commerce, habitat for fisheries and irreplaceable sources of recreation and pleasure. To paraphrase Justice Holmes, they are more than amenities; they are treasures. But unlike ancient Rome and monarchical England, the trust in which they are held is not exercised by a crowned sovereign. After the Revolution, King George's jus publicum interest in the navigable waters of America passed to the people; inalienable resources entrusted to the sovereign States. The title to these waters, their beds and banks passes to the States under the Constitution. The States' ownership of these waters is an essential attribute of their sovereignty. *Utah Division Of State Lands v. United States*, 482 U.S. 193, 195 (1987). Suggestions that the States' sovereign interests in these waters were foreclosed by the actions of federal agencies taken before statehood must be received cautiously, and subjected to the most rigorous review.

SUMMARY OF ARGUMENT

Our lakes and rivers do not recognize political boundaries. Just as they run through counties and sometimes over state lines, they may run through federal reservations. There is nothing inherently inconsistent or unacceptable about a State sovereign river running through a federal reservation, or a State sovereign lake existing within one. The history of public land law is largely one that deals with the coexistence of two sovereigns within one state. Such coexistence can be messy,

and at times conducive to fraternal strife. No doubt it might be neater to have a central government based on the continental system, in which States act as departments run from Washington. Cf. *New York v. United States*, 505 U.S. 144, 187 (1992). But the Constitution calls for a different system: one in which the States are sovereigns, stewards of their navigable waters and other resources.

With the Revolution, the people of the thirteen original States assumed the sovereignty of the crown and with it, title to their navigable waters. When the federal government acquired additional lands, it held their waters in trust for the future States. The new States assumed sovereignty over them under the equal footing doctrine. Although there may be times when the central government has reason to abort a state's constitutional right to its navigable waters by making prestatehood reservations, these occasions are few and far between. This Court has provided a series of bright lines against which assertions that States' rights have been terminated are measured. Such grave actions, depriving States as they do of a portion of their sovereignty, are not to be inferred lightly. These standards are guided by the principle that Congress holds the navigable waters in trust for the future States. They are further guided by the constitutional doctrine that new States are admitted to the union on an equal footing with the original ones. Their sovereign rights should not be diminished by the happenstance that for a brief period they were territories, in which the United States exercised paramount control under the Property Clause.

The trust in which the federal government holds navigable waters for the future States necessarily must be

analyzed in terms of the trust obligations this Court has held apply to the States once they take title to them on statehood. The trust in which these waters are held prohibits abdication of control over them. They "cannot be placed entirely beyond the direction and control of the [future] State." *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 454 (1892). Control over them for purposes of the trust can only be relinquished for purposes of the trust. Parcels relinquished must be limited to those that can be disposed of without substantial impairment of public interest in the remaining lands and waters, and the intent to dispose of them must be made in the most clear and specific terms. There is necessarily a strong presumption that this trust was not violated by the acts of the federal government before statehood. A prestatehood withdrawal is not valid unless it is made by Congress for an appropriate public purpose, defined in terms of "international duty or public exigency." *Shively v. Bowlby*, 152 U.S. 1, 50 (1894). Furthermore, Congress must have shown expressly that it intended to withdraw the navigable water in question, and that it intended in so doing to defeat a State's equal footing interest.

The Ninth Circuit opinion below muddies these objective safeguards. It accepts as adequate to prove a valid prestatehood withdrawal 1) an ambiguous executive order, followed by 2) expressed Senatorial confusion, 3) a self-serving agency memorandum and 4) an agreement *not ratified by Congress until after statehood*. If this is to be the standard by which the defeat of equal footing rights is measured, States are placed potentially at risk of losing their most treasured waters to sudden and unheralded claims brought by the federal government

under this vague and uncertain rule. Any vestiges of the equal footing rule, and the trust obligation of the United States toward future States, is obliterated. The States' constitutionally-derived powers over these waters should not rest on such shifting sands.

ARGUMENT

I.

THE NAVIGABLE WATERS ARE HELD IN TRUST FOR FUTURE STATES.

A. Control Over Navigable Waters is an Attribute of State Sovereignty.

Many chapters of United States history are given over to the controversies between State and federal sovereigns over lands and waters. The retention by the federal government of large tracts of land – sometimes amounting to well over half the lands within a particular State – has inevitably given rise to tension and conflict when expansive federal interests have collided with States' efforts to regulate and administer resources acquired by virtue of their sovereignty. Sometimes the principles of federalism have been neglected in the process. This Court only recently counseled for consideration of the special concerns that arise when a federal policy "alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Solid Waste Agency v. Corps of Engineers*, No. 99-1178, Slip Opn. 12 (Jan. 9, 2001), 531 U.S.___ (2001). In the past few years, the Court has shown itself acutely cognizant of the need to recognize that States are more than mere subdivisions of the

federal government, and that the Constitution confers on them the power and responsibility to manage and safeguard their resources. E.g., *New York v. United States*, 505 U.S. 144 (1992).

No state power is more traditional than that exercised over its navigable waters, subject only to the federal navigable easement. This Court recognized in 1842 that "When the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government." *Martin v. Waddell*, 16 Pet. (41 U.S.) 367, 410 (1842), quoted in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 282 (1997). More recently admitted States entered the Union on an equal footing with the original States and their interest over these "sovereign lands" is identical. *Pollard v. Hagan*, 3 How. (44 U.S.) 212 (1845). As this Court has observed in an earlier phase of this very litigation, "The principle which underlies the equal footing doctrine and the strong presumption of State ownership is that navigable waters uniquely implicate sovereign interests." *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 284 (1997).

B. The Federal Government Holds Navigable Waters in Trust for the Future States.

This principle of sovereign waters, held in public trust, is rooted in ancient Roman and medieval law, and reflected in the Magna Carta. *Arnold v. Mundy*, 1 Halst. (6

N.J.L.) 1 (N.J. 1821).[1] These traditions were carried to the new world from the beginning. The Great Pond Ordinance of Massachusetts Bay Colony in 1641 guaranteed the right to fish and fowl in ponds greater than 10 acres in size, with freedom of access through private property for that purpose. Similar protections were afforded freshwater lakes in Maine and New Hampshire. See Locke, Right of Access to Great Ponds by the Colonial Ordinance, 12 ME L.REV. 148 (1918); *Hardin v. Jordan*, 140 U.S. 371, 393 (1891).

As this Court observed, "[T]he men who first formed the English settlements, could not have been expected to encounter the many hardships that unavoidably attended their emigration to the new world, and to people the banks of its bays and rivers, if the land under the water at their very doors was liable to immediate appropriation by another as private property; and the settlers upon the fast land thereby excluded from its enjoyment, and

---

[1] The Institutes of Justinian restated Roman law as follows: "By the law of nature these things are common to mankind – the air, running water, the sea and consequently the shores of the sea." All rivers and ports were public, and the right of fishing was common to all men. The Institutes of Justinian 2.1.1 L (T. Cooper trans. & ed. 1841). This principle was restated in Las Sietes Partidas, the law of 13th century Spain. At about the same time, Bracton was restating the Roman rule in medieval England. There, the crown held ownership of the beds of navigable waters, but its interest was very different from that enjoyed by private landholders. The navigable waters in which public rights existed were inalienable. They could not be separated from the Crown. 2 H. Bracton, On the Laws and Customs of England 16-17, 39-40 (S. Thorne trans. 1968). See *Shively v. Bowlby*, 152 U.S. at 11-14.

unable to take a shell-fish from its bottom or fasten there a stake, or even bathe in its waters without becoming a trespasser upon the rights of another." *Martin v. Waddell*, 16 Pet. (41 U.S.) 367, 414 (1842). The enormous practical and historical significance of state sovereignty over navigable waters drives the scrutiny given assertions that Congress has defeated State interests in these waters by pre-statehood reservations. Necessarily, such assertions have been regarded with scepticism and subjected to strict, objective standards.

These waters are held "in trust for the future States to be ultimately created. . . . " *Shively v. Bowlby*, 152 U.S. at 52. This Court has stated time and again that a strong presumption exists against the inclusion of navigable waters within prestatehood reservations. They may be made only "in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce . . . or to carry out other public purposes appropriate to the objects for which the United States hold the Territory." *United States v. Alaska*, 521 U.S. 1, 40 (1997), quoting *Utah Division of State Lands v. United States*, 482 U.S. 193, 196-197; *Shively v. Bowlby*, 152 U.S. at 48.

The States' title to their sovereign waters is "conferred not by Congress but by the Constitution itself." *Idaho v. Coeur d'Alene Tribe*, 521 U.S. at 283, quoting *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977). Once the State assumes title to these waters, Congress is without power to reclaim them. *Pollard v. Hagan*, 3 How. (44 U.S.) 212, 230 (1845).

It is no light matter, then, to find that Congress intended to withhold from a newly admitted state an indispensable attribute of its sovereignty. Not only must such an action be for purposes appropriate to its responsibilities over the public lands, but there must be a showing that, before statehood, 1) Congress intended that the reservation include such waters, and 2) the United States intended to defeat the future State's title to them. *Utah Div. of State Lands, supra.* Nothing in the opinion below reflects a federal interest justifying such a drastic result as depriving the people of Idaho of "one of the Nation's most beautiful lakes," *Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261, 264 (1997) in order to place it under the exclusive jurisdiction of another sovereign refusing to acknowledge public trust responsibilities, with the apparent effect of depriving the people generally of their trust-derived rights of access and recreation. See Amicus Curiae brief of Benewah County and Kootenai County, Appendices 1, 2. Furthermore, nothing in the record shows that Congress took action to defeat the State's title prior to statehood.

II.

IDAHO'S NAVIGABLE WATERS PASSED IRREVOCABLY TO THAT STATE ON ADMISSION TO THE UNION.

A. Lake Coeur D'Alene and its Tributaries Are Sovereign Waters of the State of Idaho.

The navigable waters of Idaho, like those of other States, belong to its people. They were acquired by that State by virtue of its sovereignty, under the Constitution,

rather than by act of Congress. *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977). The water body most affected by this case is Lake Coeur d'Alene, a body of water 25 miles long and two and a half miles wide. It was once called one of the five most beautiful lakes in the world by National Geographic Magazine. It hosts one of the largest populations of osprey in the nation. Bald eagles feast on its salmon in the winter. American Automobile Assn. Tour Book 33 (Feb. 1992).

Idaho has embraced the public trust doctrine, and its courts implement it. E.g., *Kootenai Environmental Alliance v. Panhandle Yacht Club*, 671 P.2d 1085 (Ida. 1983). The protection of fisheries and other wildlife within the State is part of its public trust interest in its navigable waters: "The State holds the propriety of its soil for the conservation of the public rights of fishery thereon, and may regulate the modes of that enjoyment so as to prevent the destruction of the fishery." *Smith v. Maryland*, 59 U.S. (18 How.) 71, 75 (1955); see also, *Phillips Petroleum Co. v. Mississippi & Saga Pet.*, 484 U.S. 469, 476 (1988).

B. Neither the United States Nor the Tribe Acknowledges the Trust Responsibilities Administered by Idaho in its Navigable Waters.

Although, as this Court has observed, the Tribe for whose benefit the Lake is claimed may view the lands "just as necessary to its own dignity and ancient right," *Idaho*, 521 U.S. at 287, it is incontrovertible that neither the federal government nor the Tribe acknowledges public trust responsibilities. See C. Wilkinson, The Public Trust Doctrine in Public Land Law, 14 U.C. DAVIS L.REV.

269 (1980). Although logic compels the same trust should apply, the United States rejects any duty to take those trust responsibilities into consideration in the planning and allocation of resources for the Lake. Cf. *United Plainsmen v. North Dakota State Water Cons. Comm.*, 247 N.W.2d 457 (N.D. 1976); *National Audubon Society v. Superior Court*, 658 P.2d 709 (Cal. 1983), cert. denied, 464 U.S. 977 (1983). It rejects the principle of inalienability, so forcefully set forth in *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892). And it would potentially deny to the people of Idaho their right to use the waters of the Lake for recreation, boating, and ecological preservation. See Amicus Curiae Brief of Benewah and Kootenai Counties, App. 1-4. Cf. *Marks v. Whitney*, 491 P.2d 374 (Cal. 1971).

C. The Trust in Which Navigable Waters Are Held for the People of the Future States Severely Restricts Their Alienation.

Because these waters are held in sovereign trust, they cannot be wholly alienated. As the New Jersey Supreme Court stated in *Arnold v. Mundy*: "The sovereign power itself (in navigable waters) . . . cannot, consistently with the principles of the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right." That would be a grievance, said New Jersey's Chief Justice, "which never could be long borne by a free people." *Arnold v. Mundy*, 6 N.J.L. 1, 78 (1821); see, also *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892). A later state court expressed the principle as follows:

> The legislature has no more authority to emancipate itself from the obligation resting upon it which it assumed at the commencement of its statehood, to preserve for the benefit of all the people forever the enjoyment of the navigable waters within its boundaries, than it has to donate the school fund or the state capitol to a private purpose. It is supposed that this doctrine has been so firmly rooted in our jurisprudence as to be safe from any assault that can be made upon it. *Priewe v. Wisconsin State Land & Improvement Co.*, 79 N.W. 780, 781 (Wis. 1899).

When this Court held in *Shively* that the navigable waters were held "in trust for the several States to be ultimately created," *Shively v. Bowlby*, 152 U.S. at 57, it necessarily had in mind the attributes of the public trust in which navigable waters are held generally. Only two years before, in *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892) it had taken pains to define the limits on alienation imposed by the public trust on such lands. There, the Court held that the public's interest in Lake Michigan was such that the legislature lacked power to dispose of a major portion of its bed, consisting of the Chicago waterfront. While the legislature could make grants of parcels for trust-related purposes, and of parcels that do not substantially impair the public interest in the lands and waters remaining, the Court held, "[T]hat is a very different doctrine from the one which would sanction the abdication of the general control of the State over lands under the navigable waters of an entire harbor or bay, or of sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such water of the use of the public. The trust devolving upon the State for the public,

and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. *The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. . . . " Illinois Central,* 146 U.S. at 452-53 (emphasis added).

The Court laid down a two-part test for determining the validity of a legislative grant of navigable waters:

1. Does the disposition affirmatively aid or improve the public interest in navigation or other public use of the particular area of the waterway beneath the ordinary high watermark?

2. If the legislative grant does not affirmatively aid or improve the public trust, does the disposition substantially impair the public interest in the remaining lands and waters of the particular area of the waterway? *Ibid.*

Further, the Court held, title of the State cannot be surrendered or delegated for other than *public* purposes: "The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of peace. . . . *So with trusts connected with public property, or*

property of a special character, like lands under navigable waters; they cannot be placed entirely beyond the direction and control of the State." Id. at 453-54 (emphasis added).

When the Court in *Shively* referred to the limitations applicable to grants or navigable waters by Congress before statehood, it must have been aware of the trust limitations it imposed on such lands two years earlier. Indeed, it restated the time-honored principle that "[T]he title and the control of them are vested in the sovereign for the benefit of the whole people." *Shively v. Bowlby,* 152 U.S. at 57. The references in that opinion to the right of Congress to make prestatehood grants "for appropriate purposes," measured by such standards as "international duty" and "public exigency," 152 U.S. at 58, must necessarily be measured against the overall trust obligations spelled out in *Illinois Central* as well. It would be anomalous indeed if this Court were to hold the United States, as trustee for the future states, to a lesser duty than the one to which it subjects the States themselves as trustees of their navigable waters. It is inconceivable that the United States, a trustee of these waters for the State-to-be, may alienate them for any "public purpose," when the sovereign State is held by this Court to a strict trust standard requiring them to preserve such waters for trust purposes and prohibiting the wholesale "abdication" of control over them. *Illinois Central Railroad,* 146 U.S. at 452-53.

Nevertheless, neither the Tribe nor the United States acknowledges trust inhibitions. One of the principal critics of the Crown's ownership of navigable waters attacked that concept on the ground that the King would only sell such lands to reduce the national debt. S. Moore,

History of the Foreshore xlviii (1888). Is it beyond conception that in the absence of public trust protection, the bed of this remarkable body of water could at some future time be filled and used for commercial development or other purposes inconsistent with the people's ancient rights?

All these considerations underline the gravity of asserting that Congress, acting under the Property Clause, could and intentionally did prevent the operation of the equal footing doctrine and deprive the people of the State of a national treasure.

III.

ONLY UNDER THE MOST UNUSUAL CIRCUMSTANCES SHOULD A STATE'S SOVEREIGN WATERS BE DEEMED TO HAVE BEEN RESERVED PRIOR TO STATEHOOD.

A. Principles of Federalism Demand a Narrow Standard and a High Hurdle for Prestatehood Withdrawals.

This Court has recently observed that significant constitutional and federalism questions arise when expansive readings are given to the exercise of federal power which significantly impinges on the State's "traditional and primary power over land and water use." "[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971); *Solid Waste Agency, supra*, Slip Opinion at 13. This Court has declined in past cases to find that Congress intended to foreclose a State's equal footing rights. "Only in the most unusual

circumstances" has Congress withheld navigable waters from States. *Utah Div. of State Lands v. United States*, 482 U.S. at 197. Such prestatehood withdrawals were "not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926).[2] When the Court found a prestatehood withdrawal, it made it clear that the case was highly unusual. *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), and "based on very peculiar circumstances," *Montana v. United States*, 450 U.S. 544, 555 U.S. (1981).

More representative of the consistent precedent is *Montana v. United States*, 450 U.S 544 (1981), in which the State's interest in the bed of the Big Horn River, flowing through the Crow Tribe Reservation, was held not to be conveyed to the Tribe. As in this case, the applicable treaty did not refer expressly to the riverbed; nor was any intent to convey the bed set forth in "clear and especial

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[2] This principle is further elucidated by Congress in section 3 of the Submerged Lands Act, 43 U.S.C. sec. 11311(a), declaring it to be in the "public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop and use the said lands and natural resources, all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States. . . . " The only applicable exceptions from this provision in the Act refer to "all lands *expressly retained* by or ceded to the United States when the State entered the Union (otherwise than by a general retention or cession of lands underlying the marginal sea)." Sec. 5(a), 43 U.S.C. sec. 1313(a) (emphasis added). See *United States v. Alaska*, 521 U.S. at 63-64 (Thomas, J. dissenting).

words." 450 U.S. at 554, quoting *Martin v. Waddell*, 16 Pet. at 417.

No "clear and especial words" appear in the record here to support the drastic result reached below. Although a portion of Lake Coeur d'Alene was included within the executive reservation, nothing in the order indicated that the President intended to abrogate the trust in which navigable waters are held for future States.

B. Congress Must Act Expressly Before Statehood to Defeat the State's Claims.

Although in 1888 the Senate expressed confusion over the boundaries of the reservation, and authorized the Interior Secretary to negotiate for purchases of portions of the reservation "valuable chiefly for minerals and timber," the subsequent agreement was never accepted by Congress until *after* Idaho's statehood. *United States v. Idaho*, 210 F.3d 1062 (9th Cir. 2000). Once a State is admitted into the Union, of course, its title to navigable lakes and rivers vests and is non-revocable. *Pollard*, 3 How. at 230. Congress must act before statehood to defeat the future States' claim. *Utah*, 482 U.S. at 202.

C. The Purported Withdrawal of Lake Coeur D'Alene Before Idaho's Admission Did Not Meet the Requisite Standards.

Under accepted federalism holdings, the power of the federal government under the property clause to withhold navigable waters from a state can only be exercised in order "to perform international obligations, or to

effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States hold the Territory." *Shively v. Bowlby,* 152 U.S. 1, 48 (1894). This language must be read within the context of "international duty or public exigency." *Id.* at 58. Otherwise it could hardly stand muster in light of the fundamental principles of federalism involved. Such a purpose may necessarily exist when reservation of lands for petroleum requires retention of submerged beds as well as uplands. *United States v. Alaska,* 521 U.S. 1 (1992). Or a treaty obligation may obligate the United States to reserve a riverbed when it has promised the reservation will never be included within a state. *Choctaw National v. Oklahoma,* 397 U.S. 620 (1970).

In this case, however, it is hard to see how withdrawing one of the nation's major lakes from a State's sovereign trust lands carries out any legitimate public purpose. There is no showing in the record that Idaho's trust obligations for Lake Coeur d'Alene would permit it to exclude the Tribe from its waters, or to prevent tribal members from fishing and hunting pursuant to reasonable regulation.

D. Equal Footing Principles Call for a Narrow Construction of Federal Power to Defeat State Sovereign Title.

This is a case in which the strength of the federal interest must be evaluated "in light of the degree to

which such laws would prevent the State from functioning as a sovereign." *New York v. United States*, 505 U.S. at 163. The Constitution does not authorize Congress to require States to govern according to its instructions. *Id.* at 161. Yet the withdrawal of navigable waters seriously diminishes State sovereignty and substantially curtails the exercise of State powers. *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 523 (1926). Such considerations apply to States-to-be just as they do to existing ones. Certainly the withdrawal of a major part of one of the nation's most beautiful lakes diminishes Idaho's sovereignty. It is a violation of the principle that "[N]either government may destroy the other; nor curtail in any substantial manner the exercise of its power." *Id.* The principle under which newly admitted States accede to their navigable waterways is the equal footing doctrine, a constitutional doctrine enunciated by this Court in *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*

Since the Revolution made the people sovereign, and therefore entitled to their navigable waters and the soil under them, the Constitution demands that States later admitted to the Union have the same perquisites of sovereignty. But the new States do not receive equal footing, if their sovereignty is subject to the whim of Congress and their waters, unlike those of the 13 original States, are subject to prestatehood withdrawals. The only difference between the new States and the old is the unfortunate happenstance that the new ones existed for brief periods as territories of the United States, in which Congress exercised the Property Clause over lands in its possession and control. Earlier decisions of this Court properly stated without qualifications that these lands were held

in trust for the future State. Future decisions of this Court should hold the federal government to a strict standard in light of that trust obligation, and the right of the States to equal footing in the Union.

CONCLUSION

The bed of Lake Coeur d'Alene and its related rivers was held by the United States in trust for the future State of Idaho. The public trust in which that lake is held for the people is as applicable to the federal government as trustee as it is to the State. If "the great right of domain and ownership" in these waters was to have been withheld from the people of the State and their ancient rights of "common fishery" withdrawn, "that design . . . would have been clearly indicated by appropriate terms and would not have been left for inference from ambiguous language." *Martin v. Waddell*, 16 Pet. at 416.

As the Court stated in 1869:

> "[T]he preservation of the States, and the maintenance of their governments, are as much within the design and care of its constitution as the preservation of the union and the maintenance of the national government. The Constitution, with all its processes, looks to an indestructible union, composed of indestructible states." *Texas v. White*, 7 Wall (74 U.S.) 700, 725 (1869).

The Property Clause, like the Supremacy Clause, "gives the federal government a decided advantage in th(e) delicate balance the constitution strikes between

state and federal power." *Gregory v. Ashcroft*, 510 U.S. 460 (1991). This is not a case in which that advantage can or should be taken. The State of Idaho, under the public trust doctrine, acts as constitutional steward for Lake Coeur d'Alene. That lake's priceless resources are held for all the people of the State, as well as the tribes of Idaho. There is room in our federal system for States, tribes, and the national government. When the constitutional function of States as sovereigns can be reconciled with the federal stewardship of native peoples, there is no reason to strain for results that will only put further strains on our federal scheme.

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STATE OF IDAHO,
Petitioner,

v.

UNITED STATES OF AMERICA
AND COEUR D'ALENE TRIBE,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Respondent Coeur d'Alene Tribe ("Coeur d'Alenes" or "Tribe") submits this brief in support of the decision below.

STATEMENT

This case arises out of a nine-day bench trial in which the district court admitted and considered several thousand exhibits. The district court held that under the facts and circumstances of this case, as demonstrated by the evidence, the presumption of state ownership of submerged lands had been overcome by "compelling evidence demonstrating the Federal Government's intent to reserve the submerged lands [of part of Lake Coeur d'Alene] for the benefit of the Tribe." Appendix to Petition for Certiorari ("Pet. App.") at 61 (internal quotation marks omitted). Petitioner did "not challeng[e] the district court's factual findings" on appeal. Pet. App. 4. Nor did petitioner challenge the district court's "conclusion that executive actions reflect a clear intent to include the submerged lands within the 1873 reservation." *Id.* Petitioner rather has challenged the district court's and the court of appeals' conclusion that Congress's actions reveal a clear intent to defeat state title to the submerged lands.

In this context, petitioner's Statement is incomplete and improper. Relevant facts are omitted. Other evidentiary matters argued below, but rejected by the district court, are discussed as if still at issue. Relevant statutes, congressional committee reports, and Executive reports to Congress are either not addressed, or addressed only in limited ways that omit portions pertinent to this Court's consideration. The following Statement is more complete.[1]

1. Historic Facts/Dependence on Waters. From time immemorial the people of the Coeur d'Alene Tribe or

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[1] This Statement is generally organized by dates so that the Table of Contents of the Statement also serves as a timeline of events for this fact-intensive case.

"Schee-chu-umsch" lived on some 3.5 million acres in an area now known as northern Idaho and eastern Washington. In the heart of the Coeur d'Alenes' aboriginal homeland was a large lake (Lake Coeur d'Alene or "Lake"), fed by two large navigable rivers (Coeur d'Alene River and St. Joseph River) and drained by a third (Spokane River). *See* Joint Appendix ("J.A.") at 541 (aboriginal area outlined, showing forests, prairies, lakes, rivers, and anthropological sites). The Tribe's villages were built around its Lake and rivers. The Coeur d'Alenes were a water people.[2] The district court made specific factual findings regarding the Coeur d'Alenes' dependence on the waters and their resources, including the following:

> To summarize, the majority of the Tribe's population lived in villages located next to the Lake and rivers. The Tribe's proximity to the watercourses was no coincidence; the Lake and rivers provided resources that were essential to the Coeur d'Alenes' survival. The Tribe depended on the waterways for a year-round source of fish, small mammals, waterfowl and plant materials. The Tribe also depended on the waterways to facilitate the harvest of large mammals and to serve as a means of efficient transportation. Finally, the Tribe's spiritual,

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[2] Archaeologist expert Dr. Sprague testified that the Coeur d'Alenes were more dependent on the waters for survival than were other plains or plateau tribes involved in submerged lands ownership cases, such as the Crow, *see United States v. Finch*, 548 F.2d 822 (9th Cir. 1976), *vacated on other grounds*, 433 U.S. 676 (1977) (per curiam); *Montana v. United States*, 450 U.S. 544, 556 (1981) (holding the Crow Tribe was not dependent for survival on the waters), and the Flathead, *see Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951 (9th Cir. 1982) (holding that the Confederated Salish & Kootenai Tribes were dependent on the waters for survival). *See* J.A. 10-12 (relevant portion of Dr. Sprague's testimony).

religious and social life centered around the Lake and rivers.

. . . .

. . . Archaeological, ethnographic and linguistic studies, as well as tribal traditions and histories, confirm that the Coeur d'Alenes located the majority of their villages along the Lake and rivers, and relied on the water resource to ensure their survival.

. . . The waterways were essential to the Tribe's livelihood, providing a reliable year-round source of food and fibre. Furthermore, the Coeur d'Alenes depended on watercourses, not only for food and materials, but also in their manner of self-identification, language and religious practices.

Pet. App. 47-48 (citations and internal quotation marks omitted). This was the nature of the Coeur d'Alenes' life when Jesuit Missionaries established a mission in the 1840's and became the first white men to reside permanently in their area.

2. 1848/1853/1863 Recognition of Aboriginal Title/1853 Negotiation Authorization Statute. Congress expressly recognized the unextinguished Indian or aboriginal title of the northwest Indian tribes such as the Coeur d'Alenes in 1848 when undisputed United States domain over the Pacific Northwest was established (and it did so several times subsequently as well). *See* Act of August 14, 1848, 9 Stat. 323, J.A. 263 (Oregon territorial act governing area at issue); Act of March 2, 1853, 10 Stat. 172, 173, J.A. 263-264 (Washington territorial act governing this area); Act of March 3, 1863, 12 Stat. 808, J.A. 264 (Idaho territorial act governing this area).

In 1853 Congress specifically authorized the Executive to treat with western Indian tribes to extinguish aboriginal title to their lands. Act of March 3, 1853, 10 Stat. 238, J.A. 265,

App. 3a to this Brief. Pursuant to this congressional authority, Territorial Governor Isaac Stevens negotiated and entered into treaties with numerous northwest tribes in 1855. Governor Stevens intended similarly to treat with the Coeur d'Alenes in 1855, but was called away because of hostilities in central Washington. *See* J.A. 265-66 (1890 House of Representatives Report), 335-44 (attached Mullan letter).

3. 1858 Peace Treaty and 1867 Executive Order Reservation. In 1858, hostilities broke out between the Coeur d'Alene Tribe and the United States. These hostilities ended in a "treaty of peace and friendship" between the United States and the Coeur d'Alene Tribe. J.A. 23-25 (1858 Peace Treaty). The Coeur d'Alenes promised to return items captured from the troops, give hostages, and allow "white persons [to] travel through their country unmolested." J.A. 23-24. In return, the United States recognized the Coeur d'Alenes and promised to make a permanent treaty with the Tribe. J.A. 24. In 1867 a small reservation was set aside for the Coeur d'Alenes by President Johnson, although this was done without the Tribe's knowledge or consent. Pet. App. 50; J.A. 46-47 (1867 Executive Order).

4. 1870's Negotiation Pressure/1873 Dependence on Waters. In the early 1870's pressure built for the formal treaty which had been authorized by Congress in 1853 and promised the Tribe by Colonel Wright in 1858. In 1871 and 1872, Coeur d'Alene Chief Seltice wrote two petitions to the Commissioner of Indian Affairs. The first asked that an area of land be chartered "exclusively for us." Pet. App. 50 (first Seltice petition). The second made clear that the area must include their waters because "we need have some hunting and fishing." Pet. App. 50-51; J.A. 27 (second Seltice petition). In 1873 a government surveyor warned of "trouble" if the "fisheries" were not included in the Coeur d'Alene Reservation. Pet. App. 52; J.A. 30 (surveyor letter); *see also* J.A. 31 (accompanying map).

The district court specifically held that in 1873 the Coeur d'Alenes were dependent on the water resources for survival. Pet. App. 49-54. The district court found as follows:

> Based on all the above, the Court concludes that in 1873 the Lake and rivers were an essential part of the "basket of resources" necessary to sustain the Tribe's livelihood. While tribal members also engaged in gardening, gathering and hunting, the waterways provided a reliable, year-round source of food, fibre and transportation without which the Tribe could not have survived.

Pet. App. 54.

5. 1873 Negotiation/Agreement/Executive Order/1884 Plat. In 1873, the United States sent a negotiating team to treat with the Coeur d'Alenes. The team consisted of General Shanks, Chairman of the Indian Affairs Committee of the United States House of Representatives, Governor Bennett, territorial Governor of the Idaho Territory, and Agent Monteith, the north Idaho Indian agent. Agreement was reached. J.A. 32-37 (1873 Agreement). It provided that the 1867 Reservation would be enlarged to include most of the Tribe's Lake and portions of its rivers near the Lake, but not adjacent farmland to the south and west.[3] *Id.; see also* J.A. 541 (map of aboriginal area and of 1867 and 1873 Reservations showing prairie or farmland in yellow). The northern boundary ran "down along the center of the channel of said Spokane River" from where the River "leaves the

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[3] The formal document was an "Agreement" rather than a "Treaty" because in 1871 the House of Representatives demanded more of a say in Indian policy. After that date the United States made "Agreements" with Indian tribes to be ratified by both the House and Senate, rather than treaties ratified only by the Senate. Executive Orders continued to be used until 1919. F. Cohen, *Handbook of Federal Indian Law* 105-07, 127-28 (1982 ed.).

Coeur d'Alene lake" and was described in terms of water features so as necessarily to include the Lake and portions of the rivers in the Reservation.[4] J.A. 33-34 (1873 Agreement). In this Agreement the Tribe agreed to locate on the Reservation and to cede to the United States its aboriginal territory outside of the reservation. J.A. 34-35. The 1873 Agreement stated that it would not take effect until ratified by Congress. J.A. 36-37.

In late 1873 President Grant formally set apart by Executive Order an identical Coeur d'Alene Reservation, "mirror[ing]" the 1873 Agreement, until Congress could consider the Agreement. Pet. App. 66; J.A. 43-45 (Executive Report to Congress), 47-48 (Executive Order). The 1873 Executive Order Reservation was formally surveyed in 1883 and platted by 1884 by the General Land Office. Three unique features of that survey and plat indicate that the Lake was intended to be considered part of the reservation: (1) the survey did *not* meander the Lake or navigable rivers as would normally be done if those waters were being held for eventual transfer to a state; (2) the acreage of the Lake was included in the total acreage of the reservation; and (3) the northern boundary ran down the middle of the channel of the Spokane River. Pet. App. 57-58, 63; J.A. 49 (plat), 536 (enlargement), 12-22 (testimony of Surveyor Expert Willett).

6. 1873 Purposes/Submerged Lands Necessary. The evidence established, and the district court found, that in 1873 there were four purposes or objectives for creating the Coeur d'Alene Reservation. They were (1) to create a homeland reservation for the exclusive use of the Coeur d'Alenes, Pet. App. 64; (2) to convince the Tribe to settle on that

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[4] The fact that the Lake and the Tribe both bear the "Coeur d'Alene" name is no coincidence. Why give a lake the Tribe's name—which literally translated means "Heart of an Awl" and was intended to mean "hard bargainers," *see* Pet. App. 74 n.20—unless those of the day felt the Lake belonged to the Tribe?

reservation, Pet. App. 60-61, 64; (3) to convince the Tribe to cede its aboriginal lands for white settlement, Pet. App. 61, 64-65; and (4) to keep the peace, Pet. App. 61. Including the Lake and rivers as part of the Reservation was necessary to achieve all of these federal purposes. Inclusion of these submerged lands in the reservation was necessary to create a homeland exclusively for the Coeur d'Alenes because the Coeur d'Alenes were a water people dependent on the waters for survival. Pet. App. 54; Statement ¶ 4 (Coeur d'Alenes dependent on waters for survival in 1873). Inclusion of the submerged lands in the Reservation was necessary to convince the Coeur d'Alenes to settle on the reservation, to cede their remaining aboriginal lands, and to keep the peace because it was the *consideration* demanded by the Tribe to come to terms. "[T]he Federal Government could only achieve its goals of promoting settlement, avoiding hostilities and [effecting] extinguishments of aboriginal title by agreeing to a reservation that included the submerged lands." Pet. App. 61. This district court finding was specifically supported by a letter of Governor Bennett, one of the United States' negotiators, stating the Tribe "*demanded* an extension of their reservation so as to include the Catholic Mission and fishing and mill privileges on the Spokane River," Pet. App. 56-57 (emphasis in original); J.A. 38 (Bennett letter) (emphasis in original), and by a report by Agent Monteith, another of the United States negotiators, that "by running down the Spokane [River, the Tribe] can put the mills at the upper falls at much less expense than building a steam mill." Pet. App. 56.

Petitioner *did not challenge* below the finding that the 1873 Executive Order reserved the submerged lands for the Tribe. Pet. App. 4 n.3 ("the State concedes that the 1873 executive order was intended to reserve title to the submerged lands for the benefit of the Tribe"); Pet. Br. 17 ("the State conceded, for purposes of appeal, that the executive branch had intended, or by 1888 had interpreted, the 1873 Executive

Order Reservation to include submerged lands"). The district court was correct in its unchallenged finding that "the actions of the Executive reflected a clear intent to retain for the benefit of the Tribe the submerged lands within the 1873 reservation." Pet. App. 66.

7. 1886 Dispute over Liquor Sales on the Lake. An incident in 1886 demonstrates without question that those at the highest levels of the Executive branch understood Lake Coeur d'Alene itself to be included in the Reservation. In the mid-1880's steamboats carrying miners and supplies to the newly discovered gold and silver mines upstream of the Reservation began crossing Lake Coeur d'Alene pursuant to the 1858 Peace Treaty's consent to allow non-Indians to cross the Tribe's country "unmolested." J.A. 52-58 (Report of Lt. Col. Lazelle), 24 (1858 Peace Treaty). But the steamers were selling liquor to the miners on board as they crossed the Lake through the Reservation. This led to an investigation of the unlawful selling of liquor on an Indian reservation. The federal action taken was described in a series of letters among the Attorney General, the Secretary of the Interior, and the Secretary of War. J.A. 52-61. The Attorney General described the sale of liquor on Lake Coeur d'Alene as a "prima facie violation of Section 2139 Revised Statutes prohibiting the introduction of ardent spirits within the Indian country." J.A. 60. As the district court stated, "[b]ecause government officials considered the Lake and rivers lying within the outer boundaries of the 1873 reservation to be 'Indian country,' the transportation or distribution of liquor on board the steamboats constituted a violation of the Intercourse laws." Pet. App. 69. Without question, the Executive considered Lake Coeur d'Alene to be part of the Reservation in 1886.

8. 1886 Negotiation Authorization Statute. In 1885 Chief Seltice wrote the President and Congress, petitioning on behalf of the Coeur d'Alenes (a) that "a proper treaty of peace and friendship" be entered into; (b) that proper and full

compensation for "their lands not now reserved" be paid; and (c) that the "present reserve may be confirmed to them." J.A. 346-52 (Chief Seltice Petition). The petition made mention of Lake Coeur d'Alene. J.A. 348 ("It includes the Coeur d'Alene Lake and Coeur d'Alene River . . . .").

Rather than simply ratify the Coeur d'Alene Agreement negotiated in 1873, Congress chose to delegate by a statute a new negotiating commission to negotiate with not only the Coeur d'Alenes, but also a number of other interior northwest tribes as to whom negotiations had been previously authorized in 1853, but treaties had not been concluded or finalized. Act of May 15, 1886, 24 Stat. 29, 44, J.A. 50-51 (statute). As to the Coeur d'Alenes, the 1886 statute (1) authorized negotiations to obtain their consent to the relocation of the Spokanes and Pend d'Oreilles on the Coeur d'Alene Reservation, (2) authorized negotiations for cession of their aboriginal lands "outside the limits of the *present* Coeur d'Alene reservation," and (3) required that all agreements be ratified by Congress. J.A. 50-51 (statute) (emphasis added). This reference to "the present Coeur d'Alene Reservation" was the first congressional recognition and acknowledgment of the Coeur d'Alene Reservation established in 1873. J.A. 50-51.

9. 1887 Negotiations/Agreement. In 1887 the federal negotiators met with the Coeur d'Alenes. Agreement was reached. J.A. 62-115 (Coeur d'Alene report, Agreement, and transcript). The parties did *not* renegotiate the Reservation boundaries, or Lake ownership, simply referring to the existing Reservation. *See* J.A. 91-96 (preamble and Articles 1, 2, 3, 4, 5, 12, 13). The Coeur d'Alenes agreed to cede their aboriginal lands "except the portion of land within the boundaries of their *present* reservation in the Territory of Idaho, known as the Coeur d'Alene Reservation." J.A. 92 (Art. 2) (emphasis added). The Tribe also gave its consent that neighboring tribes could "be removed to the Coeur

d'Alene Reservation." J.A. 92 (Arts. 3 & 4). The parties agreed that "the Coeur d'Alene Reservation shall be held forever as Indian land," and that "no part of said reservation shall ever be sold, occupied, open to white settlement, or otherwise disposed of without the consent of the Indians residing on said reservation." J.A. 93 (Art. 5 of 1887 Agreement). Finally, the Agreement provided that "[t]his agreement shall not be binding on either party until ratified by Congress." J.A. 96 (Art. 14 of 1887 Agreement).

The 1887 Agreement and supporting documents were submitted to Congress by the Executive in early 1888. J.A. 62-115. The Executive Report to Congress explained that the interest in land created by Article 5 of the Agreement which could block transfer was arguably "unnecessary, inasmuch as no such thing would happen," but that it was included to calm "fears" and "allay suspicion" and, "in as strong a manner as possible, [to] bind the Government to that good faith which the Indian prizes so highly and which he thinks has been violated so frequently." J.A. 87.

10. 1886–1887 Purposes/Submerged Lands Necessary. The two congressional purposes or goals in the 1887 Agreement were stated on the face of the 1886 negotiation authorization statute itself. Act of May 15, 1886, 24 Stat. 29, 44, J.A. 50-51. They were (1) to obtain the consent of the Coeur d'Alene Tribe for the Spokane and Pend d'Oreille Indians to relocate onto the Coeur d'Alene Reservation, and (2) to obtain "the cession of [the Coeur d'Alene Tribe's] lands outside the limits of the present Coeur d'Alene reservation to the United States." *Id.* Further, petitioner has conceded "that the executive branch had intended, or by 1888 had interpreted, the 1873 Executive Order Reservation to include submerged lands." Pet. Br. 17. And Congress expressed its intent not to alter the Reservation by its reference to the "present Coeur d'Alene reservation" in the statute. J.A. 50-51.

11. 1888 Senate Questions and Interior Responses. Instead of immediately ratifying the 1887 Agreement, the Senate, by resolution, asked the Secretary of the Interior a number of questions about the Agreement. J.A. 116-17. Those questions included (1) what was "the extent of the present area and boundaries" of the reservation, (2) whether the reservation "includes any portion, and if so, about how much of the navigable waters of Lake Coeur d'Alene, and of Coeur d'Alene and St. Joseph Rivers," and (3) "whether it is advisable to release any of the navigable waters aforesaid from the limits of such reservation." J.A. 117.

The Secretary of the Interior promptly filed a thorough response. The Secretary included a report from the Commissioner of Indian Affairs and three important maps. J.A. 118-33 (Interior response), 134-36 (accompanying maps). The Reports informed Congress of the Reservation boundaries, J.A. 122-23, of the Government's understanding that the Lake and at least some of the rivers were navigable and in the reservation, J.A. 123-24, and that the United States could, in all probability, successfully negotiate for the release of "some or all" of these waters upon payment, J.A. 129-30.

The district court explained the importance of this exchange between Congress and the Executive regarding the inclusion of the submerged lands in the Reservation:

> The Senate pointedly asked the Secretary of Interior to confirm whether the Tribe retained control over the "navigable waters of Lake Coeur d'Alene and of Coeur d'Alene and St. Joseph Rivers." Ex. 187 at 693. The Commissioner of Indian Affairs, responding in detail, answered in the affirmative. It is difficult to imagine a set of circumstances that could with any greater certainty place before Congress the fact that the 1873 reservation included the land beneath the Lake and rivers.

Pet. App. 77 (footnote omitted). In short, there can be no doubt that Congress had *pre-statehood* notification that the submerged lands were included in the Coeur d'Alene Reservation.[5]

12. 1888 Railroad Right-of-Way Statute. Three months after receiving notice that Lake Coeur d'Alene and the rivers were part of the Reservation, Congress again specifically recognized and acknowledged the Coeur d'Alene Reservation. In May 1888 Congress enacted a statute granting the Washington and Idaho Railroad, a subsidiary of the Union Pacific, a conditional right of way "through the lands in Idaho Territory set apart for the use of the Coeur d'Alene Indians by executive order, commonly known as the Coeur d'Alene Indian Reservation." Act of May 30, 1888, 25 Stat. 160, J.A. 137-40 (quoted material at 137). This was the *first* pre-statehood congressional recognition and acknowledgment of the Coeur d'Alene Reservation after Congress knew that the reservation included the submerged lands. The statute made the grant conditional on approval by the Tribe and payment to the Tribe for the right-of-way land. J.A. 138-39 (Section 3 of statute). In other words, Congress treated the Coeur d'Alene Reservation as a permanent, fully recognized reservation that required tribal consent and payment before land could be taken, even by act of Congress.

13. 1889 Negotiation Authorization Statute. The Senate ratified the 1887 Agreement in 1888, J.A. 141-43 (Congressional Record of Senate vote), but the House of Representatives did not, J.A. 269-70 (1890 House of Representatives Report stating reasons why House did not ratify 1887 Agreement). Instead, in early 1889 Congress by

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[5] While the document described was a response to the Senate, it is also contained in the *pre-statehood* report of the House of Representatives, so both bodies had notice that the submerged lands were part of the Reservation *before* Idaho became a state. J.A. 262-358 (House report), 298-313 (attached Interior response); *see also* Pet. App. 77 n.22.

statute directed the Secretary of the Interior to negotiate again with the Coeur d'Alenes. Act of March 2, 1889, 25 Stat. 980, 1002, J.A. 144. The 1889 statute stated Congress's objectives and specifically recognized and acknowledged the Reservation by authorizing negotiations for "the purchase and release by said tribe of such portions of *its reservation* not agricultural and valuable chiefly for minerals and timber as such tribe shall consent to sell."[6] *Id.* (emphasis added). Despite the Senate's earlier question about submerged lands, Congress did *not* direct the Secretary of the Interior to obtain a cession of the Lake or submerged lands. Congress sought only mineral and timber lands. *Id.* As with the railroad right-of-way statute the year before, this 1889 negotiation authorization statute specifically recognized the permanent nature of the Coeur d'Alene Reservation by acknowledging that both tribal consent and compensation were required. *See id.* ("as such tribe shall consent to sell"). The Secretary of the Interior issued negotiating instructions that went further, suggesting that submerged lands might be sought but leaving the details to the negotiators. J.A. 147-49. This 1889 negotiation authorization statute was the *second* pre-statehood congressional recognition and acknowledgment of the Coeur d'Alene Reservation after Congress knew the Reservation included the submerged lands. It was the statute relied upon by the district court and the court of appeals as the basis for their decisions. Pet. App. 74-84 (district court), 21-23 (court of appeals).

14. 1889 Negotiations and Cession Agreement. In the summer of 1889 the United States' negotiating team met with the Coeur d'Alenes. Agreement was reached ceding the desired mineral and timber lands in the northern portion of

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[6] Petitioner bases much of its argument on the premise that this statute "repudiated the Reservation." Pet. Br. 21; *see also* Pet. Br. 37, 39. This is simply not correct. The act specifically recognized the Coeur d'Alene Reservation and authorized negotiations in an effort to acquire a part of it.

the reservation from the Tribe to the United States. J.A. 162-172 (President and agency report), 172-76 (negotiators' report), 176-97 (transcript of negotiations), 197-201 (Agreement), 202 (map of reservation and ceded areas). The Agreement did *not* negotiate a new reservation, but rather defined the area to be ceded from the existing reservation. J.A. 197-98 (1889 Agreement § 1).

The transcript shows that lake ownership was specifically negotiated. J.A. 182-83 (part of transcript of 1889 negotiations). The United States first proposed a form of common interest or permissive use of the Lake by the Tribe, essentially along the lines of what would result if lake ownership were to pass to the state at statehood. This was specifically rejected by the tribal negotiator, Chief Seltice:

> General SIMPSON. . . . . We have looked at the land, and would like to know now what you will take for it, if the other treaty is ratified.
>
> [Chief] SALTISE [*sic*]. Where will you make the lines?
>
> General SIMPSON. We fixed a line, as was shown you on the map; it is just as Mr. Liberty explained it to you. You understand that the lake belongs to you as well as to the whites—to all, every one who wants to travel on it.
>
> [Chief] SALTISE. That is your idea about the boundary. You know we do not understand papers; in taking it that way we will not know the boundaries.

J.A. 182-183. The United States negotiator General Simpson then changed positions, stating that the United States was willing to let the Tribe keep the St. Joseph River and the southern part of the Lake:

> General SIMPSON. You all know where the St. Joseph River is. We do not want any of that. I will explain the boundaries: [boundary description omitted].

> Now, if we buy this land you still have the St. Joseph River and the lower part of the lake and all the meadow and agricultural land along the St. Joseph River.
>
> [Chief] SALTISE. I do not quite like those boundaries; you are a chief and have directed your boundaries; now, if you ask us where we want to sell, we could talk.

J.A. 183. A map of this United States proposal is set forth at J.A. 538. Although agreement was not reached on the precise boundaries proposed by the United States in this exchange, the agreement that was reached in 1889 used the same boundary as to the Lake and St. Joseph River as was proposed by General Simpson in the quoted text. *Compare* J.A. 538 (map of Simpson proposal) *with* J.A. 540 (map of final agreement) *and* J.A. 202 (map given to Congress). The 1889 Agreement described the area to be ceded with reference to water features in such a way so as necessarily to include the submerged lands at issue in this case. J.A. 198 (boundary description in Agreement), 202 (map of cession provided to Congress). The southern boundary of the cession divided the ceded area from the remainder of the Reservation, starting at the Washington border and running "thence due east to the west shore of the Coeur d'Alene Lake; thence southerly along the west shore of said lake to a point due west of the mouth of the Coeur d'Alene River where it empties into the said lake; thence in a due east line until it intersects with the eastern boundary line of the said reservation." J.A. 198 (boundary description); *see* J.A. 202 (map provided to Congress showing cession line crossing the Lake). This description necessarily included the submerged lands in the remaining Reservation and was in accordance with General Simpson's statement that the Tribe would keep ownership of the southern portion of the Lake and the St. Joseph River. J.A. 183 (transcript); Pet. App. 75-76 (explaining southern boundary of area ceded). The undisputed evidence established that if the intent had been to *exclude* the Lake and river

from the remaining Reservation, the description would have kept running south to the end of the Lake and up the St. Joseph River and then down the other bank of the St. Joseph River and along the east shore of Lake Coeur d'Alene to the Coeur d'Alene River. J.A. 16 (testimony of Surveyor Willett).

15. 1889 Purposes/Submerged Lands Necessary. The specific congressional purposes or goals of the 1889 Agreement were stated on the face of the negotiation authorization statute itself. Act of March 2, 1889, 25 Stat. 980, 1002, J.A. 144. Congress wished to obtain the "release by said [Coeur d'Alene] tribe of such portions of its reservation not agricultural and valuable chiefly for minerals and timber as such tribe shall consent to sell." *Id.* There is *no* mention in the statute of any congressional desire to obtain the release of any portion of the Lake or any of the rivers, even though Congress had been informed by the Secretary of the Interior only a year earlier that those navigable waters were within the reservation. *Compare id.* (1889 statute) *with* J.A. 123 (1888 Interior response that submerged lands were part of reservation). Indeed, the district court found that "[r]etention of the submerged lands was necessary to achieve the United States' [1889] objective . . . ." J.A. 80; *see infra* p. 34 (quoting district court).

16. 1890 Pre-Statehood Congressional Action. The Executive sent the 1887 and 1889 Agreements, reports, maps, transcripts, and supporting material to Congress in late 1889. J.A. 162-261. In March 1890 the House of Representatives' Committee on Indian Affairs issued an extensive report on the bill to ratify the two Agreements. J.A. 262-358. The Committee Report explained that the House of Representatives had not passed the 1888 bill ratifying the 1887 Agreement (unlike the Senate which had passed the bill, J.A. 141-43) because of a concern that the mining areas and transportation routes on the Lake for the ore ought to be

excluded from the Reservation, which the Committee understood had been "specially dedicated to the exclusive use of said Indians under the Executive order of 1873." J.A. 269. The Committee explained the background and status of relations between the United States and the Coeur d'Alene Tribe, J.A. 262-358, including the 1873 Executive Order reservation, J.A. 269, and the 1888 response from the Secretary of the Interior that the submerged lands were in the Reservation, J.A. 298-313. The report explained the desire to ratify the Agreements "in strict conformity with the terms of and in strict conformity with the request of said Indians," J.A. 270. The report finally discussed the proposed ratification of an earlier Agreement between the Tribe and Mr. Frederick Post. J.A. 271-72.

The Committee's conclusion was to "recommend the passage of this bill, the object of which is to ratify and confirm two certain agreements heretofore made with the Coeur d'Alene Indians in Idaho Territory." J.A. 262. The Senate passed an identical bill on June 7, 1890. J.A. 359-67. When the matter was considered by the full House on June 10, 1890, however, confusion arose over whether the body should consider the House bill or the just-passed Senate bill. J.A. 368-69. The result was to table the matter until the confusion could be cleared up. *Id.*

17. 1890 Idaho Statehood Act/Constitution. Less than a month after the Senate and House considered ratification of the Coeur d'Alene Agreements, Congress "accepted, ratified and confirmed" the Idaho Constitution and admitted Idaho to the Union "on an equal footing with the original states . . . ." Act of July 3, 1890, 26 Stat. 215, J.A. 370-71. The Idaho Constitution had specific provisions regarding the Indian property that Congress had excluded from the Idaho territory in 1863. *See* J.A. 264 (1890 House of Representatives Report quoting portions of 1863 Idaho Territorial Act). In particular,

the Idaho Constitution, which Congress ratified in the Statehood Act, states in part as follows:

> [T]he people of the state of Idaho . . . [f]orever disclaim all right and title . . . to all lands lying within said limits owned or held by any Indians or Indian tribes; and until the title thereto shall have been extinguished by the United States, the same shall be subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States. . . .

J.A. 370-71 (Idaho Constitution, Article XXI, § 19).

By this provision, the state disclaimed lands "owned or *held*" by an Indian tribe and recognized the "absolute jurisdiction and control of the Congress" over such *"Indian* lands." *Id.* (emphasis added). The interplay among (1) these disclaimers, (2) the 1873 Executive Order creating the Reservation, J.A. 47-48, (3) the provisions of Article 5 of the 1887 Agreement, which states that the reservation was "Indian land" that could not be "otherwise disposed of" without the consent of the Tribe, J.A. 93, and (4) the 1889 negotiations where the Tribe specifically rejected the United States' proposal that the Lake be held in common and the United States made clear that the southern portion of the Lake and St. Joseph River would remain the Tribe's, J.A. 183 (transcript), is central to this case.

18. 1890 Post-Statehood House Report And 1891 Ratification. A month after Idaho statehood the House Committee on Indian Affairs submitted a new report regarding the Senate bill ratifying the 1887 and 1889 Coeur d'Alene Agreements. J.A. 373-75 (August 1890 House report). The new House Report explained that the House bill for which approval was recommended in March was "exactly the same" as the Senate bill passed in June. J.A. 373 (August 1890 House report). The Committee recommended passage

of the Senate bill. This August 1890 Committee report also attached the entire March 1890 report. J.A. 374. This included the portion of the March report which made clear Congress's understanding that Lake Coeur d'Alene was within the Coeur d'Alene Reservation, J.A. 269, and its intent that the ratification bill be in strict conformity with the Agreements and the wishes of the Indians, J.A. 374. The inclusion of the pre-statehood Committee report in the post-statehood Committee report and their conformity with one another demonstrate that congressional understanding and intent throughout this period—including at the time of statehood—were that Lake Coeur d'Alene and its tributaries were reserved to the Tribe and did not pass to the State.

On March 3, 1891, Congress passed the statute ratifying the 1887 Agreement, the 1889 Agreement, and an 1871 Agreement between the Tribe and Frederick Post regarding the conveyance of certain submerged lands in the Spokane River. Act of March 3, 1891, 26 Stat. 989, 1026, J.A. 376-88. This statute formally created the special fee-like land status for the Tribe in the Reservation. J.A. 379 ("no part of said reservation shall ever be sold . . . or otherwise disposed of" without tribal consent). It made effective for the first time—and after statehood—the cession of the aboriginal lands contained in the 1887 Agreement, for that Agreement provided that it was not to be "binding on either party until ratified by Congress." J.A. 382 (1887 Agreement provision contained in statute). It made effective for the first time—and after statehood—the cession of the submerged lands in the northern part of the Reservation contained in the 1889 Agreement. J.A. 384.

The 1891 statute also made effective for the first time—and after statehood—the conveyance from the Tribe to Frederick Post of a "portion of said reservation." J.A. 387 (statute), 388 (affidavit in statute referring to "portion of the reservation"). Specifically, the statute directed the convey-

ance of the area described in an affidavit from Chief Seltice which was part of the statute. The affidavit described the area as "all three of the [Spokane] river channels and islands, with enough land on the north and south shores for water-power and improvements." J.A. 388 (Chief Seltice Affidavit quoted in statute). This statute makes clear that Congress understood that the reservation included the submerged lands, *and* that the inclusion of the submerged lands in the Reservation extended after statehood. Otherwise, Congress could not have transferred the "three of the river channels" to Frederick Post nine months after statehood.[7]

19. Harrison Strip Cession. In 1893 Congress authorized negotiations with the Coeur d'Alene Tribe for the cession of a strip of land on the northeast portion of the Reservation including the town of Harrison. Act of March 3, 1893, 27 Stat. 616. Agreement was reached. J.A. 389-402 (Harrison Cession Agreement and Report). The plat of the cession included a portion of the submerged lands which gave Harrison the ability to have a port. J.A. 403. The district court found that "[a] cession that included the lake bed would not have been necessary if title to the submerged lands had passed to Idaho at statehood." Pet. App. 85.

20. Matters Outside the Record. At pp. 2-5 of its brief, petitioner inappropriately discusses numerous twentieth-century matters outside the record in an effort to build support for its position. None of these matters was raised at trial. In

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[7] The Secretary of the Interior later issued a patent to Frederick Post for this portion of the Spokane River (which the district court found was "at all times [a] navigable watercours[e]," Pet. App. 42). *See* J.A. 404-07 (text), 408 (map). This is now the site of a large hydroelectric dam owned by Frederick Post's successor in interest, Avista Corp. (formerly Washington Water Power). It is an indefensible disparity that petitioner, though challenging for more than a quarter-century the Tribe's title to the submerged lands, has never challenged the similar title of this corporation, even though the corporation's title can have no legitimacy if the Tribe's title has none.

fact, *at petitioner's request*, exhibits after 1894 were specifically *excluded* from evidence. *See* State's Motion to Strike, Docket No. 119 (seeking to strike post-statehood exhibits and explaining that district court's prior order limiting post-statehood evidence was made at petitioner's request); July 9, 1998 Order, Docket No. 131 (striking post-statehood exhibits at petitioner's request and explaining that "[a]t trial, the Court ruled that with the exception of evidence relating to the Harrison cession in 1894, it would not consider post-statehood evidence").[8] In effect, the district court drew the evidentiary line at the beginning of the twentieth century. *Id.* One piece of proposed twentieth-century evidence is instructive in this regard. Exhibit 2254 was a 1902 letter from the Acting Commissioner of Indian Affairs to the Secretary of the Interior regarding a company's request to construct log booms for sorting logs by driving pilings into the bed of Lake Coeur d'Alene and the St. Joseph River within the Coeur d'Alene Reservation. *See* App. 4a-12a to this Brief. The letter explained that it was the United States' position that the company had to obtain the consent of the Tribe and pay the Tribe for the privilege of so using its Lake and river. *Id.* Even though Exhibit 2254 clearly showed the contemporary understanding (only twelve years after statehood) of the United States and those who lived and worked around the Reservation that the Lake belonged to the Tribe, the Exhibit was stricken at *petitioner's* request and over the Tribe's objection. *See* Docket Entry Nos. 119 (Petitioner's Motion to Strike), 128 (Tribe's objection), 131 (Order striking Ex. 2254). Particularly after successfully limiting the record to nineteenth-century events, it is truly

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[8] The Joint Appendix having been designated prior to the filing of petitioner's brief, these filings were omitted from the "Relevant Docket Entries." J.A. 1-5. Accordingly, a list of Supplementary Relevant Docket Entries is set forth at App. 1a-2a to this Brief. All filings, exhibits, and briefs, including the filings here noted, have been forwarded by the courts below to this Court pursuant to its February 16, 2001 directive.

extraordinary that petitioner would seek so to disregard the record. *See* Stern, Gressman, et al., *Supreme Court Practice*, 555-56 (7th ed. 1993).

Some of the twentieth-century items referred to by petitioner are state statutes, others are held out as "facts." As for the former, post-statehood statutes of a state legislature cannot alter what submerged lands did or did not pass to the state at statehood. *Brewer-Elliott Oil & Gas v. United States*, 260 U.S. 77, 88 (1922) (a state in dealing with the general subject of beds of streams may not legislate in a way which would destroy a title already accrued under federal law). Further, if the statutes had been raised and addressed at trial, the evidence would have shown not only that they were scarcely contemporaneous with the relevant events in this case (unlike, for example, the 1894 Harrison cession or the 1902 Executive branch letter), but also that they were not implemented as petitioner implies. As for the latter, many, if not all, of the twentieth-century "facts" asserted by petitioner are simply wrong or misleading. Indeed, if these various matters had been addressed at trial, the evidence would have shown that petitioner largely ignored Lake Coeur d'Alene over the last century.[9] For instance, if petitioner's alleged

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[9] For instance, during the first twenty-five years of its statehood, the state did not even claim ownership of the submerged lands underlying navigable lakes and rivers. *United States v. Ladley*, 4 F. Supp. 580, 582 (D. Idaho 1933) ("Under the law of Idaho at the time of statehood . . . the riparian owner upon a stream, both navigable and non-navigable, takes title to the bed of the stream.") This same rule applied to navigable lakes during that period. *Donovan-Hopka-Ninneman Co. v. Hope Lumber Co.*, 194 F. 643 (9th Cir. 1912). This remained the law until 1915 when it was overruled in *Callahan v. Price*, 146 P. 732 (Idaho 1915). It certainly is any state's right to let riparian or littoral owners hold title to the submerged lands underlying navigable waters. *Shively v. Bowlby*, 152 U.S. 1 (1894). But it is a bit much for petitioner to assert a "special relationship to the Lake" (Pet. Br. 3) when the state long did not claim ownership of submerged lands underlying navigable waters during the period at issue.

stewardship of Lake Coeur d'Alene had been an issue at trial (*compare* Pet. Br. 3-4), the evidence would have shown that petitioner did little to stop the pollution of the Lake and bird-feeding areas by upstream mine waste.[10] If petitioner's asserted regulation of Lake Coeur d'Alene had been an issue at trial, the evidence would have shown that petitioner began regulating encroachment on the Lake only *after* the United States and the Tribe asserted ownership of the Lake more than a quarter-century ago. *Compare* Idaho Code § 58-1301 et seq. (state encroachment permit statute enacted in 1974) *with In re Application for License of the Washington Water Power Company*, Project No. 2545, Federal Power Commission (now FERC) (granting intervention by the United States, April 24, 1973, and intervention by the Tribe, September 14, 1973, to seek relief based on ownership of Lake). In short, especially since it was petitioner who sought and obtained an Order at trial limiting evidence to matters in the nineteenth century, petitioner's assertions in its brief of twentieth-century matters outside the record are improper and misleading and should be disregarded.

21. Canons of Construction. The Court has articulated specific canons of construction under which the foregoing treaties or agreements and statutes are to be construed. It is a longstanding rule that treaties or agreements are to be construed as the Indians would have understood them. *See, e.g., Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675-76 (1979) (an Indian treaty is a "contract between two sovereign nations" in which

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[10] Major ongoing litigation by the Tribe and the United States is seeking to clean up this pollution. *Coeur d'Alene Tribe v. Asarco, et al.*, No. 91-342 (D. Idaho); *United States v. Asarco, et al.*, No. 96-0122 (D. Idaho), *on interlocutory appeal*, 214 F.3d 1104 (9th Cir. 2000). These cases have been consolidated for trial and bifurcated as to some issues. The trial of this multi-billion-dollar case is currently in progress. The state settled a similar claim against many of the same defendants for a mere $4.5 million.

"intention of the parties . . . must control" and must be "construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians").[11] Further, "statutes passed for the benefit of Indians are to be construed liberally in favor of Indians with ambiguous provisions interpreted to their benefit." *South Dakota v. Bourland*, 508 U.S. 679, 687 (1993) (citing *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251, 269 (1992)); *accord Bryan v. Itasca County*, 426 U.S. 373 (1976); *Antoine v. Washington*, 420 U.S. 194 (1975); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918).

SUMMARY OF ARGUMENT

The submerged lands of Lake Coeur d'Alene and the St. Joseph River within the Coeur d'Alene Reservation were reserved for the Tribe under the doctrine announced in *Utah Div. of State Lands v. United States*, 482 U.S. 193 (1987), and reaffirmed in *United States v. Alaska*, 521 U.S. 1 (1997). The clear federal intent was to include the submerged lands in the Reservation and to defeat state title to the submerged lands, thus satisfying the requirements of *Utah* as also reflected in *Alaska*. The submerged lands were also reserved for the Tribe under the alternative analysis announced in *Alaska* of Congress's explicitly recognizing an executive reservation that clearly included the submerged lands. *Alaska*, 521 U.S. at 44. Here, Congress explicitly recognized the reservation in two pre-statehood statutes and also at statehood, and Congress did so after it knew the reservation included the submerged lands. Unless *Alaska* is to be called into question,

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[11] The need for this canon is shown in this case by the fact that federal interpreter Felt, who certified that the 1887 Agreement had been "carefully read and fully explained to the Indians," could not even sign his own name—he signed with "his mark." J.A. 98.

the decisions of the courts below that state title to the submerged lands at issue was defeated should be affirmed.

ARGUMENT

The courts below correctly applied existing precedents in determining that under the particular circumstances of this case the United States defeated state title to submerged lands. There are also several other bases for affirming the judgment below.[12]

I. BY RESERVING THE SUBMERGED LANDS FOR THE TRIBE UNDER THE *UTAH* ANALYSIS AS REAFFIRMED IN *ALASKA*, THE UNITED STATES DEFEATED STATE TITLE.

Applying this Court's precedents to the circumstances of this case establishes that the submerged lands at issue were reserved by the United States for the benefit of the Tribe, thus defeating petitioner's title at statehood.[13] *Utah Div. of State Lands v. United States*, 482 U.S. 193 (1987); *United States v.*

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[12] A basis of the Tribe's ownership of these submerged lands that is not discussed here is the doctrine of unextinguished aboriginal title. The issue was raised below, but neither the district court not the court of appeals found it necessary to reach the issue. *See* Pet. App. 84 n.27 (district court) (explaining that "[i]n light of the Court's conclusion" that the Federal Government retained title, court "need not decide" aboriginal title argument); Pet. App. 13 (court of appeals) (to same effect); Brief in Opposition of Respondent Coeur d'Alene Tribe, at 7 n.4. The Coeur d'Alene Tribe's aboriginal title to the area shown at J.A. 541 was confirmed in *Coeur d'Alene Tribe v. United States*, 4 Indian Claims Commission 1 (1955). The Tribe recognizes, however, that some aspects of its aboriginal title argument may raise questions that are more appropriately addressed in the first instance by the lower courts in this case.

[13] References in this Argument section to the foregoing Statement will simply be by paragraph number (*e.g.*, "Statement ¶ 5").

Alaska, 521 U.S. 1 (1997). The question of whether state title to submerged lands could be defeated by a federal *reservation* of submerged lands was left open in *Utah*, 482 U.S. at 201, and answered in the affirmative in *Alaska*, 521 U.S. at 33-34. These cases establish that a future state's title to submerged lands was defeated by a federal reservation if there could be shown (1) clear intent to include the submerged lands in the reservation and (2) clear intent to defeat state title. *Utah*, 482 U.S. at 202; *Alaska*, 521 U.S. at 36, 41, 44 (Petroleum Reserve), and 50 (Wildlife Refuge). In this case, as in *Alaska*, both prongs of the analysis are satisfied.

A. There Was a Clear Intent to Include Submerged Lands Within the Reservation.

The first prong of the *Utah* analysis—clear intent to include the submerged lands in the reservation—was conceded below by petitioner.[14] *See* Pet. App. 4 n.3 ("For

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[14] *Utah* and *Alaska* analyzed this first prong—intent to include the submerged lands in the reservation—by examining (1) whether the boundary of the reservation was described with reference to water features that necessarily included the submerged lands and (2) whether inclusion of the submerged lands was necessary to accomplish the purposes for which the reservation was created. *Utah*, 482 U.S. at 202; *Alaska* 521 U.S. at 41. In these circumstances, it is appropriate that petitioner has conceded this prong. In this case, the boundary *was* described with reference to water features that necessarily included the submerged lands. *See* Statement ¶ 5. Inclusion of the submerged lands in the reservation was also necessary for the purposes for which the reservation was created. One purpose was to create a homeland for the exclusive use of the Coeur d'Alene people. The Coeur d'Alenes were dependent on the waters for survival, so inclusion of the submerged lands was necessary to accomplish the purpose of creating a homeland for the exclusive use of the Tribe. *See* Statement ¶ 4 (dependence on the water), ¶ 6 (1873 purposes); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 88-89 (1918) (appropriate to include submerged land in Indian Reservation of tribe dependent on fishing). Inclusion of the submerged lands in the reservation was necessary to accomplish the other purposes for which the reservation was created, maintained, and altered because it was the consideration

purposes of this appeal, the State concedes that the 1873 executive order was intended to reserve title to the submerged lands for the benefit of the Tribe"). This concession by petitioner that the 1873 Reservation included the submerged lands applies to the 1887 and 1889 Agreements as well, for there was no change in the 1873 Reservation until Congress acted in 1891. The 1886 statute authorized additional negotiations with the Tribe. It did *not* direct any modification of the 1873 Reservation. *See* Statement ¶ 8. The 1888 Executive notification to Congress that the submerged lands were included as part of the 1873 Reservation did not modify the 1873 Reservation. *See* Statement ¶ 11. The 1889 statute directing additional negotiations to seek cession by the Tribe of mineral and timber lands did not modify the 1873 Reservation or even seek any cession or release of the submerged lands or Lake from the 1873 Reservation. *See* Statement ¶ 13. The 1889 Agreement did provide for an eventual reduction of the Coeur d'Alene Reservation when ratified, but the transcript of the negotiation made clear that even then the submerged lands at issue in this case were to remain part of the Reservation. *See* Statement ¶ 14. The 1890 Statehood Act/Constitution made clear that unextinguished Indian lands, surely including lands such as the 1873 Reservation which had been specifically set apart, were to remain under the absolute ownership and control of the United States. *See* Statement ¶ 17. Even *after* statehood Congress understood the submerged lands to be part of the Reservation when it conveyed "a portion of said reservation" including "all three rivers channels" to Mr. Frederick Post. Statement ¶ 18. Only in March 1891 when the 1887 and 1889 Agreements were ratified was the 1873 Reservation in any way reduced, but even then the submerged lands

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demanded by the Tribe and understood by Congress before the Tribe would agree to the United States' objectives or purposes. *See* Statement ¶ 6 (1873 purposes), ¶ 10 (1886/1887 purposes), ¶ 15 (1889 purposes).

remained part of the Reservation under the 1889 Agreement. *See* Statement ¶ 14. In short, both the Executive and Congress understood at all relevant times that the submerged lands were part of the Coeur d'Alene Reservation.

B. There Was a Clear Intent to Defeat Future State Title to the Submerged Lands.

This second prong of the *Utah* analysis—whether there was a clear intent to defeat a future state's title to the submerged lands—was addressed in *Utah* by examining whether defeat of state title to the submerged lands was necessary to accomplish Congress's goals or objectives. *See Utah*, 482 U.S. at 203, 208 (concluding that defeat of state title to submerged lands in reservation was not necessary to accomplish objective of preventing "monopolization and speculation" of uplands or "subsequently developing a reservoir or water reclamation project"). This second prong of the *Utah* analysis was also addressed in *Alaska* by variously considering (1) whether "Congress was aware" at statehood that the reservation included the submerged lands, *see Alaska*, 521 U.S. at 42 (Petroleum Reserve), 56 (Wildlife Refuge); (2) whether "defeating state title to submerged lands was necessary to achieve the United States' objective," *id.* at 42-43 (Petroleum Reserve), 58-59 (Wildlife Refuge); and (3) whether Congress retained ownership and exclusive jurisdiction at statehood or at least foreclosed state use, *id.* at 41-42 (Petroleum Reserve), 57-59 (Wildlife Refuge). All these considerations—which are not separate tests but rather considerations taken up in *Alaska* to ensure that the analysis of congressional intent is properly focused—are satisfied in this case.

1. Congress Was Aware at Statehood That the Reservation Included Submerged Lands.

In examining the second prong of the *Utah* analysis—whether there was a clear intent to defeat the future state's

title to the submerged lands—the Court in *Alaska* reviewed whether Congress knew that the reservation at issue included the submerged lands. *See Alaska*, 521 U.S. at 42 (Petroleum Reserve), 56 (Wildlife Refuge). In this case, Congress knew in 1888—two years prior to statehood—that the Coeur d'Alene Reservation included the submerged lands. *See* Statement ¶ 11 & n. 5 (discussing 1888 Interior Response to congressional inquiry). After describing the exchange between Congress and the Secretary of the Interior, the district court here pointedly found that Congress was on notice that the submerged lands were part of the Reservation. "It is difficult to imagine a set of circumstances that could with any greater certainty place before Congress the fact that the 1873 reservation included the land beneath the Lake and rivers." Pet. App. 77.

Congress also knew before statehood that Lake Coeur d'Alene and St. Joseph River would remain within the Reservation under the 1889 Agreement. In 1889 the Executive transmitted to Congress documents supporting a request for ratification of the 1887 and 1889 Agreements. J.A. 162-261. This included the transcript of the 1889 negotiations where the United States' negotiator agreed that the Tribe would "still have the St. Joseph River and the lower part of the lake" and a map of the Reservation and cession. Statement ¶ 14 (1889 Agreement Negotiations); J.A. 183 (transcript); J.A. 202 (map). Without question Congress knew at statehood that the Coeur d'Alene Reservation included the submerged lands.

2. Defeat of State Title to Submerged Lands Was Necessary to Achieve the United States' Objective or Purposes.

A second consideration in determining the second prong of the *Utah* analysis—clear intent to defeat the future state's title

to the submerged lands—is whether it was necessary to the government's goals or objectives for state title to the submerged lands to be defeated. For example, in *Utah*, the Court concluded that defeat of a future state's title was not necessary to achieve the federal objectives of preventing "monopolization and speculation" and "subsequently developing a reservoir or water reclamation project." *Utah*, 482 U.S. at 203, 208. By contrast, in *Alaska*, the Court concluded that defeat of state title was necessary as to the Petroleum Reserve at issue there in order to achieve the federal objective of "preserv[ing] the Government's ability to extract petroleum resources," and as to the Wildlife Refuge in order for a federal agency to be able to effect the "preservation of wildlife and wilderness resources." *Alaska*, 521 U.S. at 42, 46 (internal quotation marks omitted). *Alaska* also noted the importance of correctly stating the true government purposes for creating the reservation. *See id.* at 42 (noting that state had misstated federal purpose for creating reservation).

It is appropriate in this case to review the specific federal purposes or objectives in each of the three time periods—*viz.*, in 1873 when the submerged lands were initially reserved, in 1886–1887 when the 1887 Agreement was authorized by Congress and negotiated, and in 1889 when the 1889 Agreement was authorized by Congress and negotiated. Defeat of a future state's title to the submerged lands was necessary to accomplish federal purposes or objectives at each stage, and the 1886 and 1889 statutes should be interpreted in light of this.

There were several federal purposes for creating the Coeur d'Alene Reservation in 1873. One was to create a homeland for the Coeur d'Alenes, a water-dependent people. Defeat of state title was necessary to accomplish this objective because the Coeur d'Alenes relied upon their fishery and other water resources for survival. *See* Pet. App. 49-54; Statement ¶¶ 1, 4. The other federal purposes in 1873 were "promoting

settlement, avoiding hostilities and extinguishing aboriginal title."[15] Pet. App. 61; *accord* Statement ¶ 6. These federal purposes or objectives could only be achieved if the Tribe agreed to them, and that required, as the district court stated, "the Federal Government['s] . . . agreeing to a reservation that included the submerged lands." Pet. App. 61. And just as accomplishing these goals required inclusion of the submerged lands in the Reservation, so too did it require defeat of the future state's title to these submerged lands. Again, tribal assent was necessary to furthering these federal objectives, and, from the Tribe's perspective, not intending to defeat the future state's title would have been the same as *excluding* the Lake from the reservation in the first place. In either case, the Tribe would have been relegated to a permissive-use or common-interest status with regard to the Lake. This is what the evidence showed was unacceptable to the Tribe. *See* J.A. 30 (surveyor's letter); Pet App. 52 (findings regarding surveyor's letter); J.A. 38-41 (Governor Bennett's letter); Pet. App. 56-58 (findings regarding Governor Bennett's letter); Statement ¶ 6 (summarizing this evidence and these findings). Defeat of the future state's title to the submerged lands in the 1873 Reservation was thus necessary to accomplish the United States' purposes or objectives.

In 1886–1887, the federal goals were set out on the face of the 1886 statute authorizing negotiations. Those federal goals were (1) to obtain the Coeur d'Alenes' consent to neighboring tribes relocating on the Coeur d'Alene Reservation, and (2) to obtain the "cession of [Coeur d'Alene] lands outside the limits of the *present* Coeur d'Alene reservation to

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[15] Petitioner's discussion of the purposes of the 1873 Reservation completely ignores these three federal purposes which the district court found could be accomplished only by including the submerged lands in the 1873 Reservation. *See* Pet. Br. 44-48.

the United States."[16] J.A. 50-51 (emphasis added). The reference to the "present" reservation evidences a congressional realization that the only way the United States could accomplish its objectives was to leave intact the 1873 Reservation and everything included in it. *See* Statement ¶ 10 (1886–1887 purposes).

In 1889 the federal goals were again set out on the face of a negotiation authorization statute. They were to obtain mineral and timber lands.[17] *See* J.A. 144; Statement ¶ 13 (negotiation authorization statute), ¶ 15 (1889 purposes). In the exchange between Chief Seltice and 1889 negotiator General Simpson, the Tribe expressly rejected the same type of ownership status for the Lake as would result if the submerged lands passed to the state at statehood:

> General SIMPSON. . . . . You understand that the lake belongs to you as well as to the whites—to all, every one who wants to travel on it.
>
> [Chief] SALTISE. That is your idea about the boundary. You know we do not understand papers; in taking it that way we will not know the boundaries.

J.A. 183; Statement ¶ 14. The Coeur d'Alenes, who the district court found were "[k]nown for their sagacity," Pet. App. 74, demonstrated in this exchange their rejection of a permissive-use or common-interest status for the Lake. General Simpson, seeing that he could not achieve his

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[16] Here, too, petitioner completely ignores the expressed congressional goals and the clear way Congress dealt with them. *See* Pet. Br. 44-48.

[17] Petitioner acknowledges only in passing these express statutory goals of obtaining mineral and timber lands in the 1889 negotiation authorization act. Pet. Br. 46. Instead, petitioner urges that Congress's goal in the 1889 statute was to "protect the Tribe's agricultural lands." *Id.* But the only protection of the Tribe's agricultural interests in the statute was that the federal negotiators were told to leave the farmland alone. *Id.* This is not protection; it is simply a directive to do no damage.

objective of the cession of the mineral and timber lands if he insisted on such a status for the Lake, changed his approach immediately and dramatically. The following is his response to Chief Seltice's foregoing statement:

> General SIMPSON. You all know where the St. Joseph River is. We do not want any of that. I will explain the boundaries: [boundary description omitted here].
>
> *Now if we buy this land you still have the St. Joseph River and the lower part of the lake and all the meadow and agricultural land along the St. Joseph River.*

J.A. 183 (emphasis added); *see* J.A. 538, 540 (maps showing boundaries described as to Lake and St. Joseph River identical to boundaries eventually agreed upon) *and* J.A. 202 (map of Reservation after 1889 cession, attached to 1889 Executive Report to Congress regarding 1887 and 1889 Coeur d'Alene Agreements). In these circumstances, it is clear that defeat of state title would be necessary for the United States to accede to the Tribe's rejection of the common-interest status such as would result from ownership of the Lake passing to the state at statehood. Furthermore, General Simpson's specific reference to the land surrounding the St. Joseph River ("meadow and agricultural land along the St. Joseph River") makes clear that the earlier references to the St. Joseph River were to the river itself. Ownership of the Lake and St. Joseph River thus was part of the consideration demanded by the Tribe in exchange for ceding the mineral and timber lands sought by Congress.[18] *See* Statement ¶ 15. As the district court stated:

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[18] Petitioner suggests (Br. 47) that defeat of state title would not be necessary to acomplish a federal purpose of providing "fishing opportunities for the Coeur d'Alene Tribe" because tribal members could fish under state ownership and regulation. The argument fails because something very different was bargained for and agreed to as the consideration required to acomplish Congress's specific purposes as

> Retention of the submerged lands was necessary to achieve the United States' objective, [*Alaska*, 117 S.Ct.] at 1910 [521 U.S. at 42-43], and Congress clearly contemplated continued federal ownership of those lands, *id.* at 1917 [521 U.S. at 55-59]. The 1889 agreement by its terms anticipates that the Tribe will remain the beneficial owner of the southern third of the Lake. The northern boundary line of the diminished reservation was drawn so as to bisect the Lake, and the minutes of the 1889 negotiations confirm that the placement of the boundary line was for the purpose of establishing the Tribe's rights to the Lake and rivers. This is compelling evidence that the United States intended for the Tribe to hold a beneficial interest in the submerged lands under the southern third of the Lake. Congress could not have carried into effect the terms of the 1889 agreement without retaining title to the submerged lands. Congress clearly demonstrated [in 1889] its intent to reserve the submerged lands under federal control by ratifying the Executive inclusion of the submerged land within the 1873 reservation. *See Alaska*, 117 S. Ct. at 1910-11, 1915-17 [521 U.S. at 43-45, 53-59].

Pet. App. 80-81 (citation and footnote omitted).

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shown by the above-quoted exchange between General Simpson and Chief Seltice. In other words, the agreement was that the Lake and river would be part of the Reservation not subject to any other regulatory authority or use. *Compare Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962) (barring state regulation of tribal fishing in waters reserved for the tribe in *Alaska Pacific Fisheries*, 248 U.S. 78 (1918)). Defeat of state title and regulatory authority over these waters was the consideration demanded and offered to accomplish Congress's purposes in 1889.

In short, defeat of state title to the submerged lands was necessary to achieve the United States' objectives or purposes.[19]

3. Congress Kept Exclusive Jurisdiction Over and Ownership of the Reservation in the Idaho Statehood Act.

The third consideration used in *Alaska* in assessing the second prong of the *Utah* analysis—clear intent to defeat the future state's title to the submerged lands—is whether Congress kept ownership of and jurisdiction over the reservation at statehood. *See Alaska*, 521 U.S. at 41-42 (Petroleum Reserve), 56 (Wildlife Refuge). In this case, as in *Alaska*, Congress retained ownership of and jurisdiction over the Reservation. Specifically, Article XXI, § 19 of the Idaho Constitution (J.A. 371-72), which Congress ratified in the Idaho Statehood Act (J.A. 370), is a disclaimer by Idaho of Indian land:

> [T]he people of the state of Idaho do agree and declare that we *forever disclaim* all right and title . . . *to all lands* lying within said limits *owned or held* by any Indians or Indian tribes; and until the title thereto shall have been extinguished by the United States, the same shall be subject to the disposition of the United States, and said *Indian lands* shall remain *under the absolute jurisdiction and control* of the Congress of the United States . . . .

J.A. 371 (emphasis added). There can be no doubt that the Coeur d'Alene Reservation, which had been specifically "set apart as a reservation for the Coeur d'Alene Indians" by

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[19] Amici Counties suggest (Br. 22-23) that a "public exigency" is required for Congress to be able to defeat state title. First, *Alaska* made clear that public exigency is only a congressional policy, not a constitutional requirement. *Alaska*, 521 at 40. Second, the district court explained why any public-exigency requirement was satisfied in this case. Pet. App. 60-61.

Executive Order, J.A. 47-48, was "held by any Indians or Indian tribes" or that it was "Indian lands" as referred to in the Idaho Constitution. Article 5 of the 1887 Agreement stated that the "Coeur d'Alene Reservation shall be *held* forever as *Indian land*." J.A. 93 (emphasis added). In these circumstances, the Idaho Statehood Act, ratifying the Idaho Constitution, disclaimed both ownership and jurisdiction as to the Coeur d'Alene Reservation, just as the Alaska Statehood Act disclaimed ownership and jurisdiction as to the two reservations in *Alaska*.[20]

The disclaimer does not turn, with regard to the Coeur d'Alene lands, on whether Congress had yet finally acted to approve the 1887 and 1889 Agreements. In this regard, it is helpful to recall that the reservation of the Wildlife Reserve in *Alaska* had not even been finalized at statehood. *Alaska*, 521 U.S. at 59. There was merely an application for a reservation. Here, as just recounted, there is much more. The Coeur d'Alene Reservation had been completely reserved by Executive Order and further had been expressly recognized by Congress several times, twice after learning that the submerged lands were included in the Reservation. J.A. 137-40 (1888 WIRR right-of-way statute); J.A. 144 (1889 negotiation authorization statute). Just as the disclaimer in *Alaska* was not limited to "completed reservations," *Alaska*, 521 U.S. at 59, so too the Indian disclaimer here is not limited to reservations where Congress

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[20] This Court found a similar state disclaimer of Indian lands, coupled with a prior reservation, to defeat state regulatory authority which would have existed if the state had owned the submerged lands. *Metlakatla Indian Community, Annette Island Reserve v. Egan*, 369 U.S. 45, 57-59 (1962) (holding reservation of submerged lands addressed in *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918), coupled with Indian disclaimer clause in Alaska Statehood Act, defeated state's ability to regulate fish traps on submerged lands). *Compare Kake v. Egan*, 369 U.S. 60 (1962) (reaching opposite result where there was no prior reservation).

had already *conveyed* title to a tribe (as would subsequently occur in this case in 1891, *see supra* Statement ¶ 18; *infra* Part II.B.3, when Congress ratified the 1887 and 1889 Agreements), but includes, as just recounted, the Tribe's Executive Order reservation of which Congress was aware.

* * * *

In summary, the facts of this case establish that future state title to the submerged lands at issue was defeated by Congress under both prongs of the *Utah* reservation analysis used in *Utah* and *Alaska*. The first prong was conceded by petitioner below. The second prong was satisfied by Congress's being informed that the Reservation included the submerged lands, by the fact that defeat of state title to the submerged lands was necessary to accomplish the federal purposes and objectives, and by the federal government's keeping ownership of and jurisdiction over the Reservation at statehood. Congress's intent that the submerged lands be included in the Reservation and state title be defeated has been "definitely declared or otherwise made very plain." *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926). The presumption of state ownership of submerged lands has thus been overcome.

II. THE UNITED STATES RESERVED THE SUBMERGED LANDS FOR THE BENEFIT OF THE TRIBE UNDER THE ALTERNATIVE *ALASKA* ANALYSIS.

Although the foregoing adequately supports affirmance of the judgment, other grounds exist as well. In particular, in *Alaska* this Court articulated an alternative method for analyzing whether state title to submerged lands had been defeated by an Executive reservation. Specifically, after setting forth the foregoing test—stating that "there would have been no barrier to Congress retaining a petroleum reserve, including submerged lands, at the point of Alaska's

statehood, provided it satisfied *Utah Div. of State Lands*' requirements of demonstrating a clear intent to include submerged lands within the Reserve's scope and a clear intent to defeat Alaska's title"—the Court in *Alaska* also stated thus: "It follows that Congress could achieve the same result [of defeating state title to submerged lands] by explicitly recognizing, at the point of Alaska's statehood, an executive reservation that clearly included submerged lands." *Alaska*, 521 U.S. at 44. This is, in fact, the analytical approach applied by the district court and the court of appeals. Pet. App. 78-81 & n.25 (district court); Pet. App. 21-23 (court of appeals).

A. Congress Was Notified That the Executive Reservation Clearly Included Submerged Lands.

In *Alaska*, the Court first looked at whether "Congress [was] on notice that the President had construed his reservation authority to extend to submerged lands and had exercised that authority to set aside uplands and submerged lands." *Alaska*, 521 U.S. at 45. This point is beyond dispute in this case. In 1888, two years before statehood, the Department of the Interior informed Congress that the submerged lands were part of the Reservation. *See* Statement ¶ 11. A second *pre-statehood* notice to Congress that the submerged lands had been included in the Coeur d'Alene Reservation was the 1889 Message from the Executive to Congress contained in the documents supporting ratification of the 1887 and 1889 Agreements. *See* J.A. 162-261; Statement ¶ 14. It included the transcript of the 1889 negotiation exchange between Chief Seltice and General Simpson previously quoted showing that the parties' intent had been and continued to be that the submerged lands were part of the Reservation. J.A. 182-83; *see* Statement ¶ 14; *supra* pp. 32-33. *Further, the map attached to this Executive report to Congress even showed the reservation boundary*

bisecting the Lake, including the southern part of the Lake and lower St. Joseph River in the Reservation. See J.A. 202; *compare Alaska*, 521 U.S. at 56 (discussing map provided to Congress showing submerged lands in Wildlife Refuge). Without doubt these documents gave Congress *pre-statehood* notice "that the President had construed his reservation authority to extend to submerged lands and had exercised that authority to set aside uplands and submerged lands" in the 1873 Executive Order Coeur d'Alene Reservation. *Alaska*, 521 U.S. at 45.

B. Congress Explicitly Recognized the Coeur d'Alene Reservation Both Before and at Statehood.

Congress "explicitly recogniz[ed]," *Alaska*, 521 U.S. at 44, the Coeur d'Alene Reservation twice before statehood and again at statehood. *See* Statement ¶ 12 (discussing Act of May 30, 1888, 25 Stat. 160, J.A. 137-40 (pre-statehood statute granting railroad right of way through the Coeur d'Alene Reservation)); Statement ¶ 13 (discussing Act of March 2, 1889, 25 Stat. 980, 1002, J.A. 144 (pre-statehood statute authorizing negotiations with Coeur d'Alenes for the cession of some of the land in their reservation)); Statement ¶ 17 (discussing Act of July 3, 1890, 26 Stat. 215 ch. 656, J.A. 370-372 (statehood statute ratifying state Constitution which disclaimed ownership of and jurisdiction over Indian land)).[21] The district court and court of appeals both based their decisions on the 1889 negotiation authorization statute. Pet. App. 78-79 (district court); Pet. App. 21-23 (court of

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[21] Amici Counties suggest (Br. 21) that President Grant had no authority to issue the 1873 Executive Order, citing an Attorney General's Opinion predating President Grant's Order. This argument not only was not raised below and not only flies in the face of concessions by the party that *amici* support, but also is beside the point because of the three express congressional recognitions of the Executive Order Coeur d'Alene Reservation that are cited in the text immediately preceding this footnote.

appeals). Any one of these three recognitions of the Reservation satisfies the explicit-congressional-recognition standard of *Alaska*.[22]

1. Congress Explicitly Recognized the Coeur d'Alene Reservation *Before Statehood* After It Knew the Submerged Lands Were Included in the Reservation.

Twice before statehood Congress explicitly recognized the Coeur d'Alene Reservation *after* it knew the Reservation included the submerged lands. On February 9, 1888, the Secretary of the Interior responded to Congress that most of Lake Coeur d'Alene—along with the Coeur d'Alene and St. Joseph Rivers—was in the Coeur d'Alene Reservation and could probably be released through further negotiation and payment. J.A. 118-36. Congress expressly recognized the Coeur d'Alene Reservation three months after Congress was thus informed that the Reservation included the submerged lands: On May 30, 1888, Congress specifically recognized the Reservation when a statute was passed granting the Washington and Idaho Railroad a right of way through the

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[22] Amici Counties suggest (Br. 15) that prior congressional authorization is required before the Executive can reserve submerged lands and that such authority existed in *Alaska*, 521 U.S. at 41-42. Amici are wrong on both counts. This Court in *Alaska* assumed that the state's argument was correct that the Pickett Act did not authorize the Executive's reservation of the Petroleum Reserve, but still found the state's title to the submerged lands had been defeated. *Alaska*, 521 U.S. at 43-44. In all events, in this case there was prior congressional authorization for the Executive to treat with northwest Indian tribes such as the Coeur d'Alenes. *See* Statement ¶ 2 (discussing Act of March 3, 1853, 10 Stat. 238 (authorizing treaty negotiations), App. 3a to this Brief). Prior to statehood Congress noted that the intent had been to treat with the Coeur d'Alenes in 1855, but circumstances prevented it. J.A. 265-66 (Committee statement), 335-44 (Mullan letter). In this case there thus was greater congressional authorization for the Executive's reservation than in *Alaska*.

Coeur d'Alene Reservation, conditioned upon the railroad's obtaining tribal consent and making appropriate payment to the Tribe. *See* Statement ¶ 12; Act of May 30, 1888, 25 Stat. 160, J.A. 137-40 ("An act granting to the Washington and Idaho Railroad Company the right of way through the Coeur d'Alene Indian Reservation").[23] The second pre-statehood congressional recognition of the Coeur d'Alene Reservation *after* Congress knew the Reservation included the submerged lands was in 1889, when Congress statutorily authorized negotiations with the Coeur d'Alene Tribe to seek "the purchase and release by said tribe of such portions of *its reservation* not agricultural and valuable chiefly for mineral and timber as such tribe shall consent to sell." Act of Mar. 2, 1889, 25 Stat. 980, 1002, J.A. 144 (emphasis added).

Both of these statutes recognized the Tribe's particular interest in the reservation by requiring both consent and payment before land or an interest in land could be purchased from the Tribe.[24] As the district court stated, "[b]y

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[23] The first time that the Coeur d'Alene Reservation was explicitly recognized by Congress was two years earlier in 1886 when Congress authorized negotiations with the Coeur d'Alenes to obtain their consent for the "removal" of neighboring tribes to the "Coeur d'Alene reservatio[n]" and to negotiate with the Coeur d'Alenes for cession "of their lands outside the limits of the *present* Coeur d'Alene reservation to the United States." Act of May 15, 1886, 24 Stat. 29, 44, J.A. 50 (emphasis added). However, this 1886 congressional recognition of the Coeur d'Alene Reservation is insufficient to establish the congressional-recognition element, just as the congressional action in *Utah* was insufficient, because when it was taken, "Congress was not on notice that [the Executive] had reserved the bed of the lake." *Alaska*, 521 U.S. at 44-45 (explaining why United States' claimed reservation of Utah Lake was rejected in *Utah*).

[24] Petitioner contends that the Tribe's interest in the Reservation was mere use and occupancy, suggesting it was nothing more than a generalized recognition of the Tribe's aboriginal rights. Pet. Br. 42-44. Congress's requirement of consent and payment indicates it understood the Tribe to have a greater legal interest in the Reservation.

authorizing the Federal Government to negotiate with the Tribe for a release of the submerged lands, Congress [in 1889] acknowledged that the Executive Order of 1873 had effectively conveyed beneficial ownership of those lands to the Coeur d'Alenes. Accordingly, the Court concludes that Congress recognized and then ratified the Executive reservation of the submerged lands for the benefit of the Tribe." Pet. App. 78. The court of appeals also carefully articulated Congress's recognition and acknowledgment of the Coeur d'Alene Reservation in the 1889 negotiation authorization statute:

> The express reference to the reservation as *the Tribe's reservation*, explicit recognition that the choice to sell was the Tribe's, and reference to *tribal release* of portions of *its reservation* all manifest an awareness and acceptance by Congress of the boundaries of the 1873 reservation—boundaries that included submerged lands. This series of events indicates that Congress accepted the Secretary's advice to leave any cession up to negotiations. Indeed, the fact that Congress decided to make its authorization open-ended reinforces the district court's conclusion that Congress recognized and accepted the Tribe's beneficial ownership of all lands—including submerged lands—within the 1873 reservation . . . .
>
> In short, Congress "otherwise made very plain," *Holt State Bank*, 270 U.S. at 55, its intention regarding the submerged lands . . . . Although Congress may have been unhappy to learn that the executive reservation included submerged lands, its actions show recognition and acceptance of the passage of beneficial ownership to the Tribe, for it sought to *regain* as much submerged land as possible.

Pet. App. 21-23 (emphasis in original). These two pre-statehood statutes are express congressional recognition of

the Coeur d'Alene Reservation *after* Congress knew the Coeur d'Alene Reservation included the submerged lands.

Petitioner and Amici Counties, by contrast, urge a standard that was not articulated in *Alaska* and that would not have allowed the result in *Alaska*. They suggest that the statute in which Congress acknowledges a reservation that it knows includes submerged lands must specifically refer to submerged lands. *See* Pet. Br. 40-42; Amici Counties Br. 22. Not only is this not what *Alaska* held, but if it were the standard, *Alaska* would have had a different result. In particular, as to the Petroleum Reserve in *Alaska*, Congress in § 11(b) of the Alaska Statehood Act made *no reference* to the submerged lands, only referring to the reservation "naval petroleum reserve numbered 4." *Alaska*, 521 U.S. at 41. This is a reference to "a 23-million acre federal reservation in the northwestern part of the State," *id.* at 32, and not "an express reference to submerged lands," as petitioner apparently believes, Pet. Br. 40. *See also Alaska*, 521 U.S. at 38-42 (making clear that Alaska Statehood Act does not *on its face* refer to submerged lands in Petroleum Reserve). Nonetheless, Congress was held to have defeated state title. The same is true here. The statutes in this case, which referred only to the reservation, meet the *Alaska* standard. *See* J.A. 137 (railroad right-of-way statute referring to "Coeur d'Alene Indian Reservation"); J.A. 144 (1889 negotiation authorization act referring to "its [*i.e.*, Coeur d'Alene Tribe's] reservation").

In short, in both the 1888 railroad statute and the 1889 negotiation authorization statute, Congress "explicitly recognized" the Coeur d'Alene Reservation, which was an "executive reservation which clearly included submerged lands." *Alaska*, 521 U.S. at 44.

2. Congress Explicitly Recognized the Coeur d'Alene Reservation *At Statehood* After It Knew the Submerged Lands Were Included in the Reservation.

Congress also explicitly recognized the Coeur d'Alene Reservation at statehood, again after it knew the Reservation included the submerged lands. As discussed above, Congress knew prior to statehood that the submerged lands were included in the Reservation. *See* Statement ¶ 11 (1888 Interior response to congressional inquiry whether submerged lands were in reservation); Statement ¶ 14 (1889 negotiation transcript showing submerged lands were to remain in reservation). On July 3, 1890, Congress "accepted, ratified, and confirmed the Idaho Constitution" and "declared" Idaho to be a state. Idaho Statehood Act/Constitution, Act of July 3, 1890, 26 Stat. 215 ch. 656, J.A. 370-71; Statement ¶ 17. Article XXI, § 19 of the Idaho Constitution, ratified simultaneously with and as part of the grant of statehood, disclaimed title to land "owned or held" by any Indian tribe and disclaimed jurisdiction over "Indian land," with "absolute jurisdiction and control" remaining in Congress:

> [T]he people of the state of Idaho . . . [f]orever disclaim all right and title . . . to all lands lying within said limits owned or held by any Indians or Indian tribes; and until the title thereto shall have been extinguished by the United States, the same shall be subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States . . . .

J.A. 371 (Idaho Constitution, Article XXI § 19).

This specific recognition of federal ownership of and jurisdiction over the Coeur d'Alene Reservation has the same operative effect as the provisions of § 11(b) of the Alaska Statehood Act as to the Petroleum Reserve. In *Alaska*, this

Court held that "Section 11(b) of the Alaska Statehood Act, which noted that the United States owned the Reserve and which included the statement of exclusive legislative jurisdiction under the Enclave Clause, reflects Congress' intent to ratify the inclusion of submerged lands within the reserve and defeat the State's title to those lands." 521 U.S. at 46. *Alaska* reached the same conclusion as to the Wildlife Refuge as well, this time based on § 6(e) of the Alaska Statehood Act. Specifically, the Court held that "Section 6(e) of the Alaska Statehood Act expressly prevented lands that had been 'set apart as [a] refug[e]' from passing to Alaska." *Alaska*, 521 U.S. at 61. In all three disclaimers—the two in *Alaska* and the one here—ownership and jurisdiction were disclaimed by the state. This is sufficient to defeat state title to submerged lands where Congress knew, at the time of statehood, that the submerged lands were included in the reservation. *See id.* at 46 (Petroleum Reserve); *id.* at 61 (Wildlife Reserve). State title to the submerged lands at issue here was similarly defeated by Congress's ratification in the Idaho Statehood Act of the state's disclaimer.

3. Congress's Post-Statehood Actions Reflect the Fact That It Had Previously Defeated State Title to the Submerged Lands.

Congress completed its ratification of the 1887 and 1889 Agreements in March 1891, eight months after statehood.[25]

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[25] In ratifying these two Agreements, Congress conveyed or granted the Reservation to the Tribe. Congress thereby granted to the Tribe a greater property interest in the Reservation than was conveyed to many other tribes. Often grants to Indian tribes by treaty or agreement conveyed only the right of use and occupancy. In approving the 1887 Agreement, by contrast, Congress conveyed to the Tribe a right that the Reservation could not be "sold . . . or otherwise disposed of without the consent of the Indians residing on said reservation." J.A. 379 (Article 5 of 1887 Agreement in ratification statute). This is in the nature more of fee title than of mere possessory interest of use and occupancy. *See Montana v. United States*, 450 U.S. 544, 555 n.5 (1981) (distinguishing the

Amici Counties suggest (Br. 22) that this post-statehood ratification "implies that Congress did not intend to defeat Idaho's title to the beds of navigable waters." The circumstances of this case suggest just the opposite. Congress's ratification of the two Agreements demonstrates Congress's understanding that it had previously defeated state title to the submerged lands. That is the only way the House of Representatives' Committee Reports could accurately state —both before *and after* statehood—that the intent of the pending bill was to ratify the 1887 and 1889 Agreements "in strict conformity with the request of said Indians," which the 1889 transcript made clear required including the submerged lands.[26] J.A. 270 (pre-statehood report); J.A. 374 (post-statehood report reflecting fact of identical text); J.A. 183 (1889 transcript showing tribal understanding that submerged lands would be included in the Reservation); *see also* Statement ¶ 6 (1873 purposes), ¶ 10 (1886/1887 purposes), ¶ 15 (1889 purposes).

The relevance of Congress's action in 1891 is not that Congress then defeated state title: Congress had already done that in its 1888 railroad statute or in its 1889 negotiation-authorization statute or, at a minimum, in its 1890 statehood statute. In the 1891 statute, Congress merely conveyed that which had already been reserved and to which Congress had

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circumstances with the Crow Tribe, where only a possessory interest in reservation was conveyed and state title to submerged lands was not defeated, from circumstances in *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), where fee title was conveyed and state title to the submerged lands was defeated). Petitioner's argument (Br. 42-44) that the Tribe's interest is merely one of "use and occupancy" is thus not correct.

[26] This report that the purpose of the statute was to ratify the Agreements "in strict conformity with the request of said Indians as recited in said treaties" is in keeping with the canons of construction that Indian treaties are to be interpreted as the Indians would have understood them. *See* Statement ¶ 21; *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. at 675-76 (1976).

already defeated state title. There is no reason to construe the various congressional acts (of 1888, 1889, 1890, and 1891) so as to conclude that Congress was undertaking a vain exercise when as part of its 1891 approval of the 1887 and 1889 Agreements it made clear that the Tribe had authority over the submerged lands at issue here. *See* Statement ¶ 18 (describing 1891 Act). Yet that is the construction that petitioner requires to win this case.[27]

That Congress intended *at or before* statehood to *defeat* state title to the submerged lands and *after* statehood to *convey* most of the lands to the Tribe is also made plain by Congress's direction in 1891 (in the ratification statute) that a patent be issued to Frederick Post for "a portion of said [Coeur d'Alene] reservation" that "included all three of the river channels" in the navigable Spokane River. J.A. 388 (authorization statute); *see* Statement ¶ 18 & n.7 (discussion of Frederick Post patent). Here, too, Congress was conveying land to which it had already preserved federal title. Finally, the 1893 congressional act authorizing the 1894 Harrison cession, in which the Tribe ceded a portion of the Lake, is a further reflection of the understanding of all at the time that

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[27] There is no analogue in *Alaska* to the 1891 statute in this case because in *Alaska* Congress never intended to convey the reserved lands; its purpose was to retain them for the United States. As a separate matter, it could also be suggested that, even though the ratification of the 1887 and 1889 Agreements occurred after statehood, the operative effect of those Agreements regarding the submerged lands related back to their date of execution in 1887 and 1889. The operative language in each Agreement was merely that they would "not be binding" until ratified. J.A. 96 (1887 Agreement); J.A. 199 (1889 Agreement). Relation back of these Agreements once ratified would be in keeping with the decisions in *Northern Pacific R.R. v. Wismer*, 246 U.S. 283, 288 (1918) (executive order creating Indian reservation effective on date of original agreement, not later date of issuance of Order), and *Buttz v. Northern Pacific R.R.*, 119 U.S. 55, 69-70 (1886) (agreement with Indian tribe "to be binding from its ratification" held to be effective from date approved by Executive branch, not later date of congressional ratification).

Congress had previously defeated state title. Statement ¶ 19 (Harrison Cession). As the district court found, "[a] cession that included the lake bed [at Harrison] would not have been necessary if title to the submerged lands had passed to Idaho at statehood." Pet. App. 85.

* * * *

In summary, *Alaska* establishes that state title to submerged lands is defeated "by explicitly recognizing, at the point of [the State's] statehood, an executive reservation that clearly includes submerged lands." 521 U.S. at 44. In this case, Congress was notified prior to statehood that the Executive "had construed his reservation authority to extend to submerged lands and had exercised that authority to set aside uplands and submerged lands." *Compare id.* at 45. Possessed of this knowledge, Congress expressly recognized the Coeur d'Alene Reservation twice before statehood and once at statehood. Congress's intent that the submerged lands be included in the Reservation and state title defeated has been "definitely declared or otherwise made very plain." *Holt State Bank*, 270 U.S. at 55. The presumption against state ownership of submerged lands has been overcome.[28]

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[28] Amici Counties (Br. 25-28) suggest that the Tribe claims a right improperly to prohibit or regulate use of the Lake. In fact, non-tribal use of the Lake is guaranteed by the 1858 Peace Treaty, J.A. 24 (promise of Coeur d'Alenes that "all white persons shall travel through their country unmolested"), and by the predominant doctrine of navigational servitude, *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700, 707-08 (1987) (explaining that the federal doctrine of navigatitional servitude is applicable to navigable waters held to be tribally owned in *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970)). Furthermore, the Tribe is not prohibiting use of the Lake, but it is appropriately regulating the Lake. *See* Coeur d'Alene Tribal Code Chapter 20 (fishing), 42 (Water Quality), 43 (Boating), and 44 (Encroachments) (2000 edition); *see also supra* p. 23 n.10 (demonstrating that Tribe has played leading role in seeking to force environmental clean-up of the Lake).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

No. CV-94-00328-EJL

UNITED STATES OF AMERICA, *et al.*,
Petitioner,

v.

IDAHO,
Defendant.

SUPPLEMENTARY RELEVANT DOCKET ENTRIES

No.	DATE	DESCRIPTION
131	7/09/1998	ORDER by Honorable Edward J. Lodge granting in part motion to strike listed pla's exhibits and conditional withdrawal of listed State exhibits [119-1] (See order for list of exhibits to be striken) (cc: all counsel) [Date Entered: 07/10/98, By: dkh]
129	2/06/1998	NOTICE OF MOTION DETERMINATION PROCEDURE- motion to strike listed pla's exhibits and conditional withdrawal of listed State exhibits [119-1] will be decided on written submissions (cc: all counsel) [Date Entered: 02/09/98, By: dkh]
128	1/22/1998	RESPONSE by Coeur d'Alene Tribe to motion to strike listed pla's exhibits and conditional withdrawal of listed State exhibits [119-1] [Date Entered: 01/26/98, By: dkh]

DATE	NO.	DESCRIPTION
127	1/22/1998	RESPONSE by pla USA to motion to strike listed pla's exhibits and conditional withdrawal of listed State exhibits [119-1] [Dated Entered: 01/23/98, By: dkh]
119	1/08/1998	MOTION by Idaho, State of to strike listed pla's exhibits and conditional withdrawal of listed State exhibits [Date Entered: 01/09/98, By: dkh]

APPENDIX B

STATUTES

THIRTY-SECOND CONGRESS. SESS II CH. 104 1853

Act of March 3, 1853
10 Stat 238

CHAP. CIV.—*An Act making Appropriations for the current and contingent Expenses of the Indian Department, and for fulfilling Treaty Stipulations with various Indian Tribes, for the year ending June thirtieth, one thousand eight hundred and fifty-four.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be and are hereby appropriated, out of any money in the Treasury not otherwise appropriated, for the purpose of paying the current and contingent expenses of the Indian Department, and fulfilling treaty stipulations with the various Indian tribes.

Negotiations with Indians west of Missouri and Iowa.

SEC. 2. *And be it further enacted*, That the President of the United States be, and he hereby is, authorized, immediately after the passage of this act, to enter into negotiation with the Indian tribes west of the States of Missouri and Iowa for the purpose of securing the assent of said tribes to the settlement of the citizens of the United States upon the lands claimed by said Indians, and for the purpose of extinguishing the title of said Indian tribes in whole or in part to said lands and that, for the purpose of carrying into effect the provisions of this section, the sum of fifty thousand dollars is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated.

APPENDIX C

TRIAL EXHIBIT *2254*

DEPARTMENT OF THE INTERIOR
OFFICE OF INDIAN AFFAIRS

Washington, June 25, 1902

The Honorable

The Secretary of the Interior.

Sir:

The office has the honor to invite your attention to the matter of the application of the St. Joe Boom Company, Limited, of Coeur d'Alene, Idaho, for the privilege of constructing and maintaining logging and sorting booms on the Coeur d'Alene Lake and in St. Joe River, within the limits of the Coeur d'Alene Indian reservation, Idaho.

In connection with this matter the attention of the Department is invited to two reports of this office dated March 7, 1902, upon the respective applications of C.R. Smith, et al., and of the St. Joe Boom Company for the privilege of constructing and maintaining log booms at the head of Coeur d'Alene Lake and in the St. Joe River, near its outlet, said applications and the maps accompanying the same having been referred to the Interior Department by the Secretary of War with the request for the views of this office thereon.

Under date of April 7, 1902, William T. S. Curtis, an attorney for the St. Joe Boom Company, residing in this city, addressed a letter to this office setting forth that the St. Joe Boom Company had in accordance with a conference by its representatives with officials of this Department and of the

War Department gone to considerable expense in making surveys and preparing maps etc., and had made formal application to the Secretary of War for the privilege indicated; that he was subsequently advised that other parties, viz., C.R. Smith, et al., had filed an application for similar privileges in direct conflict with the rights of the St. Joe Boom Company and their vested interests, and that the petitioners believe that the application of the other parties named was not made in good faith or in furtherance of any labors performed, as in the case of the St. Joe Boom Company.

Mr. Curtis accordingly protested against the granting of any boom privileges to other than the St. Joe Boom Company, and requested that all action on the subject be held in abeyance until said company should have had opportunity to present in more detailed form its reasons showing why its application should be granted to the exclusion of other applicants.

On April 29, 1902, Mr. Curtis addressed another letter to this office in which he requested that the matter of the application of the St. Joe Boom Company be referred to U.S. Indian Agent A.M. Anderson for further report as to the question of the advisability of granting such application, and whether or not, if granted, it would be detrimental to the rights of the Indians.

By letter of May 2, 1902, Hon. J.H. Davidson addressed a letter to this office stating that he had been authorized by C.R. Smith, et al., who had recently filed application for the erection and maintenance of a boom for sorting and rafting logs on Lake Coeur d'Alene and the St. Joe River, Idaho, to respectfully request that no further consideration be given to their application for such permission, but that favorable action, if possible, be taken upon the application of the St. Joe River Improvement Company (St. Joe Boom Company ?) for

the erection and maintenance of a boom at practically the same place as originally asked for by said Smith and others.

The office accordingly, under date of May 10, 1902, wrote to Agent Anderson, of the Colville Agency, enclosing said letter of Mr. Curtis, dated April, 29, 1902, and of Representative Davidson, dated May 2, 1902, and stated that Mr. Curtis had informally advised the office that the object of the St. Joe Boom Company in asking to have the matter referred to Agent Anderson was to save time,—the opposition on the part of the Indians being the one obstacle in the way, now that the Smith people had withdrawn their request for permission to construct a boom. The office stated that it had no objection to Agent Anderson taking up the matter with the St. Joe Company whenever they were prepared to submit their case.

He was requested to report to the office his conclusions and recommendations in the premises. In conclusion it was remarked that the office had taken the position that the proposed boom should not be authorized without the consent of the Indians and reasonable payment for the privilege if demanded by them, but that however the office could see no objection to his hearing what the interested parties had to say.

The office is in receipt of a report from Agent Anderson, dated the 13th instant, in which he states that he met the Indians in council at DeSmet Mission on June 2d and . . . fully explained to them the contents of the aforesaid office letter; that after much discussion of the subject, a committee consisting of six chiefs and leading men of the tribe was designated to accompany him to the St. Joe River for the purpose of making a thorough examination of the premises desired to be used by the company in connection with the proposed booms and sorting works; that it was given full power to act for and on behalf of the tribe and to make such terms with the company as would seem to be fair and for the best interests of all concerned, and that said committee

accordingly met him on the 9th of June, at Harrison, Idaho, from whence they proceeded by steamboat to the point at the head of the lake where the company's sorting works have been established and thence up the St. Joe River and Chatcolet Lake along the lines of the booms, as indicated on the company's map.

Agent Anderson further states that after its deliberations the committee decided that on condition that the boom company would provide for a 200 foot opening in the boom line at a point below the draw bridge across St. Joe River where the Indians are maintaining and operating a ferry boat, and on the further condition that the company would pay an annual rent of $500, the same to be expended for the benefit of the Indians in such manner as would best promote their interests, there would be no objection, so far as the Indians are concerned, to granting the privilege asked for. These conditions, the agent says, were assented to by the representatives of the St. Joe Boom Company who accompanied the Indians and were present at their deliberations. A letter accepting these terms by the company its attached to Agent Anderson's report.

The latter reports further that while in the town of Harrison, which is a large saw mill center, situated near the proposed booms, he took occasion to interview the mill owners for the purpose of ascertaining their views respecting the application of the St. Joe Boom Company, but that he found only one firm, that of Kroetch Bros., who were opposing the company on grounds which from their own personal statements made to him seemed to be entirely of a personal nature and should not, therefore, be given consideration.

The agent says that all admitted that the proposed boom and sorting works were an absolute necessity and that they could not get along without the same; that the St. Joe Boom Company is financially able to conduct the enterprise and that

with the exception of one firm named all joined in recommending that the privilege asked for by that company should he granted.

In conclusion Agent Anderson states that after having thoroughly investigated and examined into the matter, as directed, he finds that the proposed booms and sorting works will in no way interfere with any of the Indians residing upon the Coeur d'Alene reservation, and that the compensation of $500 per annum which the company agrees to pay for the privilege asked is more than ample, considering the fact that no damage will be sustained by the Indians. The works, he says, are a public necessity and will materially aid the saw mill interests of that section of the country.

He accordingly recommends that the privilege to conduct and maintain booms and sorting works, as indicated by their map showing the location of such booms and sorting works, be granted to the said St. Joe Boom Company.

Accompanying Agent Anderson's report are letters by the William Howard Land and Lumber Company, the Coeur d'Alene Lumber Company, the St. Joe Lumber Company, the Harrison Box and Lumber Company, and Fred Grant, manufacturer of lumber, to the general effect that the proposed boom and sorting works at the mouth of St. Joe River are a necessary improvement and that the St. Joe Boom Company, being a responsible concern, should be granted the privilege of conducting and maintaining such boom.

Agent Anderson also forwards with his report 12 statements in the forms of affidavits, by the following named parties: E.S. Crane, contractor of Harrison; Warren Flint, lumberman, of Harrison; Fred Grant, lumberman, of Harrison; D.R. Cameron, lumberman, of Harrison; J.C. White, Civil Engineer, of Coeur d'Alene; Armand Perrenaud, a merchant of Coeur d'Alene; Edward T. Whitney, a contractor of Clarksia; Joseph Cole, a steamboat man, of St.

Maries; F.A. Shallis., a merchant of Coeur d'Alene; Joseph T. Scott, an Editor and Publisher, of Coeur d'Alene, David F. Mason, Postmaster at Coeur d'Alene, and Joseph I. Shallis, a steamboat man.

The aforesaid statements are of the general effect and set forth that the proposed log booms and sorting works, as shown by the map of the company, will not interfere with the free and uninterrupted use by the Indians, or anyone else, of the ferry at St. Joe crossing, the plans providing for a 200 foot opening which will also afford ample room for the operation of such ferry; that the proposed boom will not interfere at all with the use by the Indians of the pasture lands on the opposite side of the river as the crossing will always be available and as the boom will not extend above the draw bridge of the Oregon Railroad and Navigation Company's railroad, thus leaving the whole river above the bridge unobstructed; that the boom will not have a tendency to fill up the St. Joe River at its mouth, actual soundings showing that the river is 30 feet deep at that point which is a greater depth than at any point between there and the draw bridge where the piling ends; that as the stream is a rapid one the logs will float on the surface and not go to the bottom of the river as would be the case if the current were strong, and that there will not therefore be a tendency for the river to fill up; that the proposed boom and sorting works are a public necessity for the proper handling of the large amount of logs, poles, etc., which must be floated down the St. Joe River, and that the works will do no injury whatever to the Indians.

After giving careful consideration to this entire subject and in view of the report and recommendation made and submitted by Agent Anderson, the office is of the opinion that so far as the interests of the Indians and of the Indian Department are concerned there is no objection to the construction and maintenance of logging booms and sorting

works by the St. Joe Boom Company, as indicated in their map made and filed.

Inasmuch, however, as the proposed piling in connection with the works referred to is to be placed in a navigable lake and river the office is of the opinion that the matter is primarily and essentially one for the War Department to arrange for and supervise. However, it is suggested that the arrangements made with said company should require it to so operate and maintain the boomerage as not at any time to congest the river at its outlet and cause the same to overflow the adjacent Indian lands.

It would also seem to be proper that the company should be required to remove all piling and obstructions placed by them in said river and lake when the further use of the boom works is no longer required and their use is discontinued. To this end it is suggested that the company should be required to give a proper bond to insure the proper performance of its obligations and also to secure the annual payment agreed to be made to the Indians of the Coeur d'Alene reservation.

In connection with this subject the office has to state that on the 18th instant Hon. T.L. Glenn left in this office a communication addressed to the Department of the Interior, dated June 12, 1902, by the Empire Mill Company (without autograph signature), also statements by W.L. Stone, Victor Le Doux and George W. Pierce, such statements being in the nature of protests against the granting of the privilege of constructing and maintaining log booms, as indicated, to the St. Joe Boom Company.

The Empire Mill Company in its said letter sets forth that in March last Agent Anderson advised them that the Department had decided to leave the question of constructing logging booms to the Coeur d'Alene Indians to decide; that terms were accordingly made with the Indians whereby it was agreed to pay them $500 annually for the privilege, the

agreement to be subject to ratification by the Department; that said company was invited by representative Indians to meet them and Agent Anderson at DeSmet Mission on June 2d, and that Mr. Anderson then and there denied that the Indians had anything to do or say in the matter and conducted himself in a manner unbecoming an officer of the Department.

Said Empire Mill Company protests against the granting of the privilege proposed to the St. Joe Boom Company and invites an investigation.

In connection with this protest attention is invited to the statement contained in Agent Anderson's report to the effect that he found but one firm opposed to the granting of a boom privilege to the St. Joe Boom Company, viz., the firm of Kroetch Bros., and in this connection attention is invited to the fact that two of the statements above referred to, those of W.L. Stone and Victor Le Doux, are witnessed by L.I. Kroetch. It is therefore suggested that the Empire Mill Company and Kroetch Bros, referred to by Agent Anderson, are probably one and the same concern.

If so, it is submitted that so far as the protest against the granting of a boom privilege to the St. Joe Boom Company is concerned the report of Agent Anderson effectually disposes of the matter.

The sentiment in favor of the St. Joe Boom Company is apparently almost overwhelming.

Respecting the alleged conduct of Agent Anderson towards the representatives of said Empire Mill Company at the Indian council, the office has to say that said agent has been called upon for a statement.

Agent Anderson's aforesaid report, together with all the affidavits and papers accompanying the same, and the papers filed by Hon. T.L. Glenn, are transmitted, herewith, with the recommendation that they be submitted to the Secretary of

War for such further action upon the application of the St. Joe Boom Company as may be deemed proper.

It is suggested that the War Department be requested to advise this Department of its action in the premises.

There is no application of said St. Joe Boom Company or by any other person or company for the boom privilege under consideration, now on file in this office, the applications of said St. Joe Boom Company and of C.R. Smith, et al., having been returned to the Department by office report of March 7,1902.

Very respectfully,

Your obedient servant,

/s/ Illegible
Acting Commissioner.

(J.R.W.)

P.

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IN THE
Supreme Court of the United States

STATE OF IDAHO,

Petitioner,

v.

UNITED STATES OF AMERICA
AND COEUR D'ALENE TRIBE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT COEUR D'ALENE TRIBE

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Respondent Coeur d'Alene Tribe ("Coeur d'Alenes" or "Tribe") submits this brief in support of the decision below.

STATEMENT

This case arises out of a nine-day bench trial in which the district court admitted and considered several thousand exhibits. The district court held that under the facts and circumstances of this case, as demonstrated by the evidence, the presumption of state ownership of submerged lands had been overcome by "compelling evidence demonstrating the Federal Government's intent to reserve the submerged lands [of part of Lake Coeur d'Alene] for the benefit of the Tribe." Appendix to Petition for Certiorari ("Pet. App.") at 61 (internal quotation marks omitted). Petitioner did "not challeng[e] the district court's factual findings" on appeal. Pet. App. 4. Nor did petitioner challenge the district court's "conclusion that executive actions reflect a clear intent to include the submerged lands within the 1873 reservation." *Id.* Petitioner rather has challenged the district court's and the court of appeals' conclusion that Congress's actions reveal a clear intent to defeat state title to the submerged lands.

In this context, petitioner's Statement is incomplete and improper. Relevant facts are omitted. Other evidentiary matters argued below, but rejected by the district court, are discussed as if still at issue. Relevant statutes, congressional committee reports, and Executive reports to Congress are either not addressed, or addressed only in limited ways that omit portions pertinent to this Court's consideration. The following Statement is more complete.[1]

1. Historic Facts/Dependence on Waters. From time immemorial the people of the Coeur d'Alene Tribe or

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[1] This Statement is generally organized by dates so that the Table of Contents of the Statement also serves as a timeline of events for this fact-intensive case.

"Schee-chu-umsch" lived on some 3.5 million acres in an area now known as northern Idaho and eastern Washington. In the heart of the Coeur d'Alenes' aboriginal homeland was a large lake (Lake Coeur d'Alene or "Lake"), fed by two large navigable rivers (Coeur d'Alene River and St. Joseph River) and drained by a third (Spokane River). *See* Joint Appendix ("J.A.") at 541 (aboriginal area outlined, showing forests, prairies, lakes, rivers, and anthropological sites). The Tribe's villages were built around its Lake and rivers. The Coeur d'Alenes were a water people.[2] The district court made specific factual findings regarding the Coeur d'Alenes' dependence on the waters and their resources, including the following:

> To summarize, the majority of the Tribe's population lived in villages located next to the Lake and rivers. The Tribe's proximity to the watercourses was no coincidence; the Lake and rivers provided resources that were essential to the Coeur d'Alenes' survival. The Tribe depended on the waterways for a year-round source of fish, small mammals, waterfowl and plant materials. The Tribe also depended on the waterways to facilitate the harvest of large mammals and to serve as a means of efficient transportation. Finally, the Tribe's spiritual,

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[2] Archaeologist expert Dr. Sprague testified that the Coeur d'Alenes were more dependent on the waters for survival than were other plains or plateau tribes involved in submerged lands ownership cases, such as the Crow, *see United States v. Finch*, 548 F.2d 822 (9th Cir. 1976), *vacated on other grounds*, 433 U.S. 676 (1977) (per curiam); *Montana v. United States*, 450 U.S. 544, 556 (1981) (holding the Crow Tribe was not dependent for survival on the waters), and the Flathead, *see Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951 (9th Cir. 1982) (holding that the Confederated Salish & Kootenai Tribes were dependent on the waters for survival). *See* J.A. 10-12 (relevant portion of Dr. Sprague's testimony).

> religious and social life centered around the Lake and rivers.
>
> . . . .
>
> . . . Archaeological, ethnographic and linguistic studies, as well as tribal traditions and histories, confirm that the Coeur d'Alenes located the majority of their villages along the Lake and rivers, and relied on the water resource to ensure their survival.
>
> . . . The waterways were essential to the Tribe's livelihood, providing a reliable year-round source of food and fibre. Furthermore, the Coeur d'Alenes depended on watercourses, not only for food and materials, but also in their manner of self-identification, language and religious practices.

Pet. App. 47-48 (citations and internal quotation marks omitted). This was the nature of the Coeur d'Alenes' life when Jesuit Missionaries established a mission in the 1840's and became the first white men to reside permanently in their area.

2. 1848/1853/1863 Recognition of Aboriginal Title/1853 Negotiation Authorization Statute. Congress expressly recognized the unextinguished Indian or aboriginal title of the northwest Indian tribes such as the Coeur d'Alenes in 1848 when undisputed United States domain over the Pacific Northwest was established (and it did so several times subsequently as well). *See* Act of August 14, 1848, 9 Stat. 323, J.A. 263 (Oregon territorial act governing area at issue); Act of March 2, 1853, 10 Stat. 172, 173, J.A. 263-264 (Washington territorial act governing this area); Act of March 3, 1863, 12 Stat. 808, J.A. 264 (Idaho territorial act governing this area).

In 1853 Congress specifically authorized the Executive to treat with western Indian tribes to extinguish aboriginal title to their lands. Act of March 3, 1853, 10 Stat. 238, J.A. 265,

App. 3a to this Brief. Pursuant to this congressional authority, Territorial Governor Isaac Stevens negotiated and entered into treaties with numerous northwest tribes in 1855. Governor Stevens intended similarly to treat with the Coeur d'Alenes in 1855, but was called away because of hostilities in central Washington. *See* J.A. 265-66 (1890 House of Representatives Report), 335-44 (attached Mullan letter).

3. 1858 Peace Treaty and 1867 Executive Order Reservation. In 1858, hostilities broke out between the Coeur d'Alene Tribe and the United States. These hostilities ended in a "treaty of peace and friendship" between the United States and the Coeur d'Alene Tribe. J.A. 23-25 (1858 Peace Treaty). The Coeur d'Alenes promised to return items captured from the troops, give hostages, and allow "white persons [to] travel through their country unmolested." J.A. 23-24. In return, the United States recognized the Coeur d'Alenes and promised to make a permanent treaty with the Tribe. J.A. 24. In 1867 a small reservation was set aside for the Coeur d'Alenes by President Johnson, although this was done without the Tribe's knowledge or consent. Pet. App. 50; J.A. 46-47 (1867 Executive Order).

4. 1870's Negotiation Pressure/1873 Dependence on Waters. In the early 1870's pressure built for the formal treaty which had been authorized by Congress in 1853 and promised the Tribe by Colonel Wright in 1858. In 1871 and 1872, Coeur d'Alene Chief Seltice wrote two petitions to the Commissioner of Indian Affairs. The first asked that an area of land be chartered "exclusively for us." Pet. App. 50 (first Seltice petition). The second made clear that the area must include their waters because "we need have some hunting and fishing." Pet. App. 50-51; J.A. 27 (second Seltice petition). In 1873 a government surveyor warned of "trouble" if the "fisheries" were not included in the Coeur d'Alene Reservation. Pet. App. 52; J.A. 30 (surveyor letter); *see also* J.A. 31 (accompanying map).

The district court specifically held that in 1873 the Coeur d'Alenes were dependent on the water resources for survival. Pet. App. 49-54. The district court found as follows:

> Based on all the above, the Court concludes that in 1873 the Lake and rivers were an essential part of the "basket of resources" necessary to sustain the Tribe's livelihood. While tribal members also engaged in gardening, gathering and hunting, the waterways provided a reliable, year-round source of food, fibre and transportation without which the Tribe could not have survived.

Pet. App. 54.

5. 1873 Negotiation/Agreement/Executive Order/1884 Plat. In 1873, the United States sent a negotiating team to treat with the Coeur d'Alenes. The team consisted of General Shanks, Chairman of the Indian Affairs Committee of the United States House of Representatives, Governor Bennett, territorial Governor of the Idaho Territory, and Agent Monteith, the north Idaho Indian agent. Agreement was reached. J.A. 32-37 (1873 Agreement). It provided that the 1867 Reservation would be enlarged to include most of the Tribe's Lake and portions of its rivers near the Lake, but not adjacent farmland to the south and west.[3] *Id.; see also* J.A. 541 (map of aboriginal area and of 1867 and 1873 Reservations showing prairie or farmland in yellow). The northern boundary ran "down along the center of the channel of said Spokane River" from where the River "leaves the

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[3] The formal document was an "Agreement" rather than a "Treaty" because in 1871 the House of Representatives demanded more of a say in Indian policy. After that date the United States made "Agreements" with Indian tribes to be ratified by both the House and Senate, rather than treaties ratified only by the Senate. Executive Orders continued to be used until 1919. F. Cohen, *Handbook of Federal Indian Law* 105-07, 127-28 (1982 ed.).

Coeur d'Alene lake" and was described in terms of water features so as necessarily to include the Lake and portions of the rivers in the Reservation.[4] J.A. 33-34 (1873 Agreement). In this Agreement the Tribe agreed to locate on the Reservation and to cede to the United States its aboriginal territory outside of the reservation. J.A. 34-35. The 1873 Agreement stated that it would not take effect until ratified by Congress. J.A. 36-37.

In late 1873 President Grant formally set apart by Executive Order an identical Coeur d'Alene Reservation, "mirror[ing]" the 1873 Agreement, until Congress could consider the Agreement. Pet. App. 66; J.A. 43-45 (Executive Report to Congress), 47-48 (Executive Order). The 1873 Executive Order Reservation was formally surveyed in 1883 and platted by 1884 by the General Land Office. Three unique features of that survey and plat indicate that the Lake was intended to be considered part of the reservation: (1) the survey did *not* meander the Lake or navigable rivers as would normally be done if those waters were being held for eventual transfer to a state; (2) the acreage of the Lake was included in the total acreage of the reservation; and (3) the northern boundary ran down the middle of the channel of the Spokane River. Pet. App. 57-58, 63; J.A. 49 (plat), 536 (enlargement), 12-22 (testimony of Surveyor Expert Willett).

6. 1873 Purposes/Submerged Lands Necessary. The evidence established, and the district court found, that in 1873 there were four purposes or objectives for creating the Coeur d'Alene Reservation. They were (1) to create a homeland reservation for the exclusive use of the Coeur d'Alenes, Pet. App. 64; (2) to convince the Tribe to settle on that

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[4] The fact that the Lake and the Tribe both bear the "Coeur d'Alene" name is no coincidence. Why give a lake the Tribe's name—which literally translated means "Heart of an Awl" and was intended to mean "hard bargainers," *see* Pet. App. 74 n.20—unless those of the day felt the Lake belonged to the Tribe?

reservation, Pet. App. 60-61, 64; (3) to convince the Tribe to cede its aboriginal lands for white settlement, Pet. App. 61, 64-65; and (4) to keep the peace, Pet. App. 61. Including the Lake and rivers as part of the Reservation was necessary to achieve all of these federal purposes. Inclusion of these submerged lands in the reservation was necessary to create a homeland exclusively for the Coeur d'Alenes because the Coeur d'Alenes were a water people dependent on the waters for survival. Pet. App. 54; Statement ¶ 4 (Coeur d'Alenes dependent on waters for survival in 1873). Inclusion of the submerged lands in the Reservation was necessary to convince the Coeur d'Alenes to settle on the reservation, to cede their remaining aboriginal lands, and to keep the peace because it was the *consideration* demanded by the Tribe to come to terms. "[T]he Federal Government could only achieve its goals of promoting settlement, avoiding hostilities and [effecting] extinguishments of aboriginal title by agreeing to a reservation that included the submerged lands." Pet. App. 61. This district court finding was specifically supported by a letter of Governor Bennett, one of the United States' negotiators, stating the Tribe "*demanded* an extension of their reservation so as to include the Catholic Mission and fishing and mill privileges on the Spokane River," Pet. App. 56-57 (emphasis in original); J.A. 38 (Bennett letter) (emphasis in original), and by a report by Agent Monteith, another of the United States negotiators, that "by running down the Spokane [River, the Tribe] can put the mills at the upper falls at much less expense than building a steam mill." Pet. App. 56.

Petitioner *did not challenge* below the finding that the 1873 Executive Order reserved the submerged lands for the Tribe. Pet. App. 4 n.3 ("the State concedes that the 1873 executive order was intended to reserve title to the submerged lands for the benefit of the Tribe"); Pet. Br. 17 ("the State conceded, for purposes of appeal, that the executive branch had intended, or by 1888 had interpreted, the 1873 Executive

Order Reservation to include submerged lands"). The district court was correct in its unchallenged finding that "the actions of the Executive reflected a clear intent to retain for the benefit of the Tribe the submerged lands within the 1873 reservation." Pet. App. 66.

7. 1886 Dispute over Liquor Sales on the Lake. An incident in 1886 demonstrates without question that those at the highest levels of the Executive branch understood Lake Coeur d'Alene itself to be included in the Reservation. In the mid-1880's steamboats carrying miners and supplies to the newly discovered gold and silver mines upstream of the Reservation began crossing Lake Coeur d'Alene pursuant to the 1858 Peace Treaty's consent to allow non-Indians to cross the Tribe's country "unmolested." J.A. 52-58 (Report of Lt. Col. Lazelle), 24 (1858 Peace Treaty). But the steamers were selling liquor to the miners on board as they crossed the Lake through the Reservation. This led to an investigation of the unlawful selling of liquor on an Indian reservation. The federal action taken was described in a series of letters among the Attorney General, the Secretary of the Interior, and the Secretary of War. J.A. 52-61. The Attorney General described the sale of liquor on Lake Coeur d'Alene as a "prima facie violation of Section 2139 Revised Statutes prohibiting the introduction of ardent spirits within the Indian country." J.A. 60. As the district court stated, "[b]ecause government officials considered the Lake and rivers lying within the outer boundaries of the 1873 reservation to be 'Indian country,' the transportation or distribution of liquor on board the steamboats constituted a violation of the Intercourse laws." Pet. App. 69. Without question, the Executive considered Lake Coeur d'Alene to be part of the Reservation in 1886.

8. 1886 Negotiation Authorization Statute. In 1885 Chief Seltice wrote the President and Congress, petitioning on behalf of the Coeur d'Alenes (a) that "a proper treaty of peace and friendship" be entered into; (b) that proper and full

compensation for "their lands not now reserved" be paid; and (c) that the "present reserve may be confirmed to them." J.A. 346-52 (Chief Seltice Petition). The petition made mention of Lake Coeur d'Alene. J.A. 348 ("It includes the Coeur d'Alene Lake and Coeur d'Alene River . . . .").

Rather than simply ratify the Coeur d'Alene Agreement negotiated in 1873, Congress chose to delegate by a statute a new negotiating commission to negotiate with not only the Coeur d'Alenes, but also a number of other interior northwest tribes as to whom negotiations had been previously authorized in 1853, but treaties had not been concluded or finalized. Act of May 15, 1886, 24 Stat. 29, 44, J.A. 50-51 (statute). As to the Coeur d'Alenes, the 1886 statute (1) authorized negotiations to obtain their consent to the relocation of the Spokanes and Pend d'Oreilles on the Coeur d'Alene Reservation, (2) authorized negotiations for cession of their aboriginal lands "outside the limits of the *present* Coeur d'Alene reservation," and (3) required that all agreements be ratified by Congress. J.A. 50-51 (statute) (emphasis added). This reference to "the present Coeur d'Alene Reservation" was the first congressional recognition and acknowledgment of the Coeur d'Alene Reservation established in 1873. J.A. 50-51.

9. 1887 Negotiations/Agreement. In 1887 the federal negotiators met with the Coeur d'Alenes. Agreement was reached. J.A. 62-115 (Coeur d'Alene report, Agreement, and transcript). The parties did *not* renegotiate the Reservation boundaries, or Lake ownership, simply referring to the existing Reservation. *See* J.A. 91-96 (preamble and Articles 1, 2, 3, 4, 5, 12, 13). The Coeur d'Alenes agreed to cede their aboriginal lands "except the portion of land within the boundaries of their *present* reservation in the Territory of Idaho, known as the Coeur d'Alene Reservation." J.A. 92 (Art. 2) (emphasis added). The Tribe also gave its consent that neighboring tribes could "be removed to the Coeur

d'Alene Reservation." J.A. 92 (Arts. 3 & 4). The parties agreed that "the Coeur d'Alene Reservation shall be held forever as Indian land," and that "no part of said reservation shall ever be sold, occupied, open to white settlement, or otherwise disposed of without the consent of the Indians residing on said reservation." J.A. 93 (Art. 5 of 1887 Agreement). Finally, the Agreement provided that "[t]his agreement shall not be binding on either party until ratified by Congress." J.A. 96 (Art. 14 of 1887 Agreement).

The 1887 Agreement and supporting documents were submitted to Congress by the Executive in early 1888. J.A. 62-115. The Executive Report to Congress explained that the interest in land created by Article 5 of the Agreement which could block transfer was arguably "unnecessary, inasmuch as no such thing would happen," but that it was included to calm "fears" and "allay suspicion" and, "in as strong a manner as possible, [to] bind the Government to that good faith which the Indian prizes so highly and which he thinks has been violated so frequently." J.A. 87.

10. 1886–1887 Purposes/Submerged Lands Necessary. The two congressional purposes or goals in the 1887 Agreement were stated on the face of the 1886 negotiation authorization statute itself. Act of May 15, 1886, 24 Stat. 29, 44, J.A. 50-51. They were (1) to obtain the consent of the Coeur d'Alene Tribe for the Spokane and Pend d'Oreille Indians to relocate onto the Coeur d'Alene Reservation, and (2) to obtain "the cession of [the Coeur d'Alene Tribe's] lands outside the limits of the present Coeur d'Alene reservation to the United States." *Id.* Further, petitioner has conceded "that the executive branch had intended, or by 1888 had interpreted, the 1873 Executive Order Reservation to include submerged lands." Pet. Br. 17. And Congress expressed its intent not to alter the Reservation by its reference to the "present Coeur d'Alene reservation" in the statute. J.A. 50-51.

11. 1888 Senate Questions and Interior Responses. Instead of immediately ratifying the 1887 Agreement, the Senate, by resolution, asked the Secretary of the Interior a number of questions about the Agreement. J.A. 116-17. Those questions included (1) what was "the extent of the present area and boundaries" of the reservation, (2) whether the reservation "includes any portion, and if so, about how much of the navigable waters of Lake Coeur d'Alene, and of Coeur d'Alene and St. Joseph Rivers," and (3) "whether it is advisable to release any of the navigable waters aforesaid from the limits of such reservation." J.A. 117.

The Secretary of the Interior promptly filed a thorough response. The Secretary included a report from the Commissioner of Indian Affairs and three important maps. J.A. 118-33 (Interior response), 134-36 (accompanying maps). The Reports informed Congress of the Reservation boundaries, J.A. 122-23, of the Government's understanding that the Lake and at least some of the rivers were navigable and in the reservation, J.A. 123-24, and that the United States could, in all probability, successfully negotiate for the release of "some or all" of these waters upon payment, J.A. 129-30.

The district court explained the importance of this exchange between Congress and the Executive regarding the inclusion of the submerged lands in the Reservation:

> The Senate pointedly asked the Secretary of Interior to confirm whether the Tribe retained control over the "navigable waters of Lake Coeur d'Alene and of Coeur d'Alene and St. Joseph Rivers." Ex. 187 at 693. The Commissioner of Indian Affairs, responding in detail, answered in the affirmative. It is difficult to imagine a set of circumstances that could with any greater certainty place before Congress the fact that the 1873 reservation included the land beneath the Lake and rivers.

Pet. App. 77 (footnote omitted). In short, there can be no doubt that Congress had *pre-statehood* notification that the submerged lands were included in the Coeur d'Alene Reservation.[5]

12. 1888 Railroad Right-of-Way Statute. Three months after receiving notice that Lake Coeur d'Alene and the rivers were part of the Reservation, Congress again specifically recognized and acknowledged the Coeur d'Alene Reservation. In May 1888 Congress enacted a statute granting the Washington and Idaho Railroad, a subsidiary of the Union Pacific, a conditional right of way "through the lands in Idaho Territory set apart for the use of the Coeur d'Alene Indians by executive order, commonly known as the Coeur d'Alene Indian Reservation." Act of May 30, 1888, 25 Stat. 160, J.A. 137-40 (quoted material at 137). This was the *first* pre-statehood congressional recognition and acknowledgment of the Coeur d'Alene Reservation after Congress knew that the reservation included the submerged lands. The statute made the grant conditional on approval by the Tribe and payment to the Tribe for the right-of-way land. J.A. 138-39 (Section 3 of statute). In other words, Congress treated the Coeur d'Alene Reservation as a permanent, fully recognized reservation that required tribal consent and payment before land could be taken, even by act of Congress.

13. 1889 Negotiation Authorization Statute. The Senate ratified the 1887 Agreement in 1888, J.A. 141-43 (Congressional Record of Senate vote), but the House of Representatives did not, J.A. 269-70 (1890 House of Representatives Report stating reasons why House did not ratify 1887 Agreement). Instead, in early 1889 Congress by

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[5] While the document described was a response to the Senate, it is also contained in the *pre-statehood* report of the House of Representatives, so both bodies had notice that the submerged lands were part of the Reservation *before* Idaho became a state. J.A. 262-358 (House report), 298-313 (attached Interior response); *see also* Pet. App. 77 n.22.

statute directed the Secretary of the Interior to negotiate again with the Coeur d'Alenes. Act of March 2, 1889, 25 Stat. 980, 1002, J.A. 144. The 1889 statute stated Congress's objectives and specifically recognized and acknowledged the Reservation by authorizing negotiations for "the purchase and release by said tribe of such portions of *its reservation* not agricultural and valuable chiefly for minerals and timber as such tribe shall consent to sell."[6] *Id.* (emphasis added). Despite the Senate's earlier question about submerged lands, Congress did *not* direct the Secretary of the Interior to obtain a cession of the Lake or submerged lands. Congress sought only mineral and timber lands. *Id.* As with the railroad right-of-way statute the year before, this 1889 negotiation authorization statute specifically recognized the permanent nature of the Coeur d'Alene Reservation by acknowledging that both tribal consent and compensation were required. *See id.* ("as such tribe shall consent to sell"). The Secretary of the Interior issued negotiating instructions that went further, suggesting that submerged lands might be sought but leaving the details to the negotiators. J.A. 147-49. This 1889 negotiation authorization statute was the *second* pre-statehood congressional recognition and acknowledgment of the Coeur d'Alene Reservation after Congress knew the Reservation included the submerged lands. It was the statute relied upon by the district court and the court of appeals as the basis for their decisions. Pet. App. 74-84 (district court), 21-23 (court of appeals).

14. 1889 Negotiations and Cession Agreement. In the summer of 1889 the United States' negotiating team met with the Coeur d'Alenes. Agreement was reached ceding the desired mineral and timber lands in the northern portion of

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[6] Petitioner bases much of its argument on the premise that this statute "repudiated the Reservation." Pet. Br. 21; *see also* Pet. Br. 37, 39. This is simply not correct. The act specifically recognized the Coeur d'Alene Reservation and authorized negotiations in an effort to acquire a part of it.

the reservation from the Tribe to the United States. J.A. 162-172 (President and agency report), 172-76 (negotiators' report), 176-97 (transcript of negotiations), 197-201 (Agreement), 202 (map of reservation and ceded areas). The Agreement did *not* negotiate a new reservation, but rather defined the area to be ceded from the existing reservation. J.A. 197-98 (1889 Agreement § 1).

The transcript shows that lake ownership was specifically negotiated. J.A. 182-83 (part of transcript of 1889 negotiations). The United States first proposed a form of common interest or permissive use of the Lake by the Tribe, essentially along the lines of what would result if lake ownership were to pass to the state at statehood. This was specifically rejected by the tribal negotiator, Chief Seltice:

> General SIMPSON. . . . . We have looked at the land, and would like to know now what you will take for it, if the other treaty is ratified.
>
> [Chief] SALTISE [*sic*]. Where will you make the lines?
>
> General SIMPSON. We fixed a line, as was shown you on the map; it is just as Mr. Liberty explained it to you. You understand that the lake belongs to you as well as to the whites—to all, every one who wants to travel on it.
>
> [Chief] SALTISE. That is your idea about the boundary. You know we do not understand papers; in taking it that way we will not know the boundaries.

J.A. 182-183. The United States negotiator General Simpson then changed positions, stating that the United States was willing to let the Tribe keep the St. Joseph River and the southern part of the Lake:

> General SIMPSON. You all know where the St. Joseph River is. We do not want any of that. I will explain the boundaries: [boundary description omitted].

> Now, if we buy this land you still have the St. Joseph River and the lower part of the lake and all the meadow and agricultural land along the St. Joseph River.
>
> [Chief] SALTISE. I do not quite like those boundaries; you are a chief and have directed your boundaries; now, if you ask us where we want to sell, we could talk.

J.A. 183. A map of this United States proposal is set forth at J.A. 538. Although agreement was not reached on the precise boundaries proposed by the United States in this exchange, the agreement that was reached in 1889 used the same boundary as to the Lake and St. Joseph River as was proposed by General Simpson in the quoted text. *Compare* J.A. 538 (map of Simpson proposal) *with* J.A. 540 (map of final agreement) *and* J.A. 202 (map given to Congress). The 1889 Agreement described the area to be ceded with reference to water features in such a way so as necessarily to include the submerged lands at issue in this case. J.A. 198 (boundary description in Agreement), 202 (map of cession provided to Congress). The southern boundary of the cession divided the ceded area from the remainder of the Reservation, starting at the Washington border and running "thence due east to the west shore of the Coeur d'Alene Lake; thence southerly along the west shore of said lake to a point due west of the mouth of the Coeur d'Alene River where it empties into the said lake; thence in a due east line until it intersects with the eastern boundary line of the said reservation." J.A. 198 (boundary description); *see* J.A. 202 (map provided to Congress showing cession line crossing the Lake). This description necessarily included the submerged lands in the remaining Reservation and was in accordance with General Simpson's statement that the Tribe would keep ownership of the southern portion of the Lake and the St. Joseph River. J.A. 183 (transcript); Pet. App. 75-76 (explaining southern boundary of area ceded). The undisputed evidence established that if the intent had been to *exclude* the Lake and river

from the remaining Reservation, the description would have kept running south to the end of the Lake and up the St. Joseph River and then down the other bank of the St. Joseph River and along the east shore of Lake Coeur d'Alene to the Coeur d'Alene River. J.A. 16 (testimony of Surveyor Willett).

15. 1889 Purposes/Submerged Lands Necessary. The specific congressional purposes or goals of the 1889 Agreement were stated on the face of the negotiation authorization statute itself. Act of March 2, 1889, 25 Stat. 980, 1002, J.A. 144. Congress wished to obtain the "release by said [Coeur d'Alene] tribe of such portions of its reservation not agricultural and valuable chiefly for minerals and timber as such tribe shall consent to sell." *Id.* There is *no* mention in the statute of any congressional desire to obtain the release of any portion of the Lake or any of the rivers, even though Congress had been informed by the Secretary of the Interior only a year earlier that those navigable waters were within the reservation. *Compare id.* (1889 statute) *with* J.A. 123 (1888 Interior response that submerged lands were part of reservation). Indeed, the district court found that "[r]etention of the submerged lands was necessary to achieve the United States' [1889] objective . . . ." J.A. 80; *see infra* p. 34 (quoting district court).

16. 1890 Pre-Statehood Congressional Action. The Executive sent the 1887 and 1889 Agreements, reports, maps, transcripts, and supporting material to Congress in late 1889. J.A. 162-261. In March 1890 the House of Representatives' Committee on Indian Affairs issued an extensive report on the bill to ratify the two Agreements. J.A. 262-358. The Committee Report explained that the House of Representatives had not passed the 1888 bill ratifying the 1887 Agreement (unlike the Senate which had passed the bill, J.A. 141-43) because of a concern that the mining areas and transportation routes on the Lake for the ore ought to be

excluded from the Reservation, which the Committee understood had been "specially dedicated to the exclusive use of said Indians under the Executive order of 1873." J.A. 269. The Committee explained the background and status of relations between the United States and the Coeur d'Alene Tribe, J.A. 262-358, including the 1873 Executive Order reservation, J.A. 269, and the 1888 response from the Secretary of the Interior that the submerged lands were in the Reservation, J.A. 298-313. The report explained the desire to ratify the Agreements "in strict conformity with the terms of and in strict conformity with the request of said Indians," J.A. 270. The report finally discussed the proposed ratification of an earlier Agreement between the Tribe and Mr. Frederick Post. J.A. 271-72.

The Committee's conclusion was to "recommend the passage of this bill, the object of which is to ratify and confirm two certain agreements heretofore made with the Coeur d'Alene Indians in Idaho Territory." J.A. 262. The Senate passed an identical bill on June 7, 1890. J.A. 359-67. When the matter was considered by the full House on June 10, 1890, however, confusion arose over whether the body should consider the House bill or the just-passed Senate bill. J.A. 368-69. The result was to table the matter until the confusion could be cleared up. *Id.*

17. 1890 Idaho Statehood Act/Constitution. Less than a month after the Senate and House considered ratification of the Coeur d'Alene Agreements, Congress "accepted, ratified and confirmed" the Idaho Constitution and admitted Idaho to the Union "on an equal footing with the original states . . . ." Act of July 3, 1890, 26 Stat. 215, J.A. 370-71. The Idaho Constitution had specific provisions regarding the Indian property that Congress had excluded from the Idaho territory in 1863. *See* J.A. 264 (1890 House of Representatives Report quoting portions of 1863 Idaho Territorial Act). In particular,

the Idaho Constitution, which Congress ratified in the Statehood Act, states in part as follows:

> [T]he people of the state of Idaho . . . [f]orever disclaim all right and title . . . to all lands lying within said limits owned or held by any Indians or Indian tribes; and until the title thereto shall have been extinguished by the United States, the same shall be subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States. . . .

J.A. 370-71 (Idaho Constitution, Article XXI, § 19).

By this provision, the state disclaimed lands "owned or *held*" by an Indian tribe and recognized the "absolute jurisdiction and control of the Congress" over such *"Indian* lands." *Id.* (emphasis added). The interplay among (1) these disclaimers, (2) the 1873 Executive Order creating the Reservation, J.A. 47-48, (3) the provisions of Article 5 of the 1887 Agreement, which states that the reservation was "Indian land" that could not be "otherwise disposed of" without the consent of the Tribe, J.A. 93, and (4) the 1889 negotiations where the Tribe specifically rejected the United States' proposal that the Lake be held in common and the United States made clear that the southern portion of the Lake and St. Joseph River would remain the Tribe's, J.A. 183 (transcript), is central to this case.

18. 1890 Post-Statehood House Report And 1891 Ratification. A month after Idaho statehood the House Committee on Indian Affairs submitted a new report regarding the Senate bill ratifying the 1887 and 1889 Coeur d'Alene Agreements. J.A. 373-75 (August 1890 House report). The new House Report explained that the House bill for which approval was recommended in March was "exactly the same" as the Senate bill passed in June. J.A. 373 (August 1890 House report). The Committee recommended passage

of the Senate bill. This August 1890 Committee report also attached the entire March 1890 report. J.A. 374. This included the portion of the March report which made clear Congress's understanding that Lake Coeur d'Alene was within the Coeur d'Alene Reservation, J.A. 269, and its intent that the ratification bill be in strict conformity with the Agreements and the wishes of the Indians, J.A. 374. The inclusion of the pre-statehood Committee report in the post-statehood Committee report and their conformity with one another demonstrate that congressional understanding and intent throughout this period—including at the time of statehood—were that Lake Coeur d'Alene and its tributaries were reserved to the Tribe and did not pass to the State.

On March 3, 1891, Congress passed the statute ratifying the 1887 Agreement, the 1889 Agreement, and an 1871 Agreement between the Tribe and Frederick Post regarding the conveyance of certain submerged lands in the Spokane River. Act of March 3, 1891, 26 Stat. 989, 1026, J.A. 376-88. This statute formally created the special fee-like land status for the Tribe in the Reservation. J.A. 379 ("no part of said reservation shall ever be sold . . . or otherwise disposed of" without tribal consent). It made effective for the first time—and after statehood—the cession of the aboriginal lands contained in the 1887 Agreement, for that Agreement provided that it was not to be "binding on either party until ratified by Congress." J.A. 382 (1887 Agreement provision contained in statute). It made effective for the first time—and after statehood—the cession of the submerged lands in the northern part of the Reservation contained in the 1889 Agreement. J.A. 384.

The 1891 statute also made effective for the first time—and after statehood—the conveyance from the Tribe to Frederick Post of a "portion of said reservation." J.A. 387 (statute), 388 (affidavit in statute referring to "portion of the reservation"). Specifically, the statute directed the convey-

ance of the area described in an affidavit from Chief Seltice which was part of the statute. The affidavit described the area as "all three of the [Spokane] river channels and islands, with enough land on the north and south shores for water-power and improvements." J.A. 388 (Chief Seltice Affidavit quoted in statute). This statute makes clear that Congress understood that the reservation included the submerged lands, *and* that the inclusion of the submerged lands in the Reservation extended after statehood. Otherwise, Congress could not have transferred the "three of the river channels" to Frederick Post nine months after statehood.[7]

19. Harrison Strip Cession. In 1893 Congress authorized negotiations with the Coeur d'Alene Tribe for the cession of a strip of land on the northeast portion of the Reservation including the town of Harrison. Act of March 3, 1893, 27 Stat. 616. Agreement was reached. J.A. 389-402 (Harrison Cession Agreement and Report). The plat of the cession included a portion of the submerged lands which gave Harrison the ability to have a port. J.A. 403. The district court found that "[a] cession that included the lake bed would not have been necessary if title to the submerged lands had passed to Idaho at statehood." Pet. App. 85.

20. Matters Outside the Record. At pp. 2-5 of its brief, petitioner inappropriately discusses numerous twentieth-century matters outside the record in an effort to build support for its position. None of these matters was raised at trial. In

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[7] The Secretary of the Interior later issued a patent to Frederick Post for this portion of the Spokane River (which the district court found was "at all times [a] navigable watercours[e]," Pet. App. 42). *See* J.A. 404-07 (text), 408 (map). This is now the site of a large hydroelectric dam owned by Frederick Post's successor in interest, Avista Corp. (formerly Washington Water Power). It is an indefensible disparity that petitioner, though challenging for more than a quarter-century the Tribe's title to the submerged lands, has never challenged the similar title of this corporation, even though the corporation's title can have no legitimacy if the Tribe's title has none.

fact, *at petitioner's request*, exhibits after 1894 were specifically *excluded* from evidence. *See* State's Motion to Strike, Docket No. 119 (seeking to strike post-statehood exhibits and explaining that district court's prior order limiting post-statehood evidence was made at petitioner's request); July 9, 1998 Order, Docket No. 131 (striking post-statehood exhibits at petitioner's request and explaining that "[a]t trial, the Court ruled that with the exception of evidence relating to the Harrison cession in 1894, it would not consider post-statehood evidence").[8] In effect, the district court drew the evidentiary line at the beginning of the twentieth century. *Id.* One piece of proposed twentieth-century evidence is instructive in this regard. Exhibit 2254 was a 1902 letter from the Acting Commissioner of Indian Affairs to the Secretary of the Interior regarding a company's request to construct log booms for sorting logs by driving pilings into the bed of Lake Coeur d'Alene and the St. Joseph River within the Coeur d'Alene Reservation. *See* App. 4a-12a to this Brief. The letter explained that it was the United States' position that the company had to obtain the consent of the Tribe and pay the Tribe for the privilege of so using its Lake and river. *Id.* Even though Exhibit 2254 clearly showed the contemporary understanding (only twelve years after statehood) of the United States and those who lived and worked around the Reservation that the Lake belonged to the Tribe, the Exhibit was stricken at *petitioner's* request and over the Tribe's objection. *See* Docket Entry Nos. 119 (Petitioner's Motion to Strike), 128 (Tribe's objection), 131 (Order striking Ex. 2254). Particularly after successfully limiting the record to nineteenth-century events, it is truly

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[8] The Joint Appendix having been designated prior to the filing of petitioner's brief, these filings were omitted from the "Relevant Docket Entries." J.A. 1-5. Accordingly, a list of Supplementary Relevant Docket Entries is set forth at App. 1a-2a to this Brief. All filings, exhibits, and briefs, including the filings here noted, have been forwarded by the courts below to this Court pursuant to its February 16, 2001 directive.

extraordinary that petitioner would seek so to disregard the record. *See* Stern, Gressman, et al., *Supreme Court Practice*, 555-56 (7th ed. 1993).

Some of the twentieth-century items referred to by petitioner are state statutes, others are held out as "facts." As for the former, post-statehood statutes of a state legislature cannot alter what submerged lands did or did not pass to the state at statehood. *Brewer-Elliott Oil & Gas v. United States*, 260 U.S. 77, 88 (1922) (a state in dealing with the general subject of beds of streams may not legislate in a way which would destroy a title already accrued under federal law). Further, if the statutes had been raised and addressed at trial, the evidence would have shown not only that they were scarcely contemporaneous with the relevant events in this case (unlike, for example, the 1894 Harrison cession or the 1902 Executive branch letter), but also that they were not implemented as petitioner implies. As for the latter, many, if not all, of the twentieth-century "facts" asserted by petitioner are simply wrong or misleading. Indeed, if these various matters had been addressed at trial, the evidence would have shown that petitioner largely ignored Lake Coeur d'Alene over the last century.[9] For instance, if petitioner's alleged

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[9] For instance, during the first twenty-five years of its statehood, the state did not even claim ownership of the submerged lands underlying navigable lakes and rivers. *United States v. Ladley*, 4 F. Supp. 580, 582 (D. Idaho 1933) ("Under the law of Idaho at the time of statehood . . . the riparian owner upon a stream, both navigable and non-navigable, takes title to the bed of the stream.") This same rule applied to navigable lakes during that period. *Donovan-Hopka-Ninneman Co. v. Hope Lumber Co.*, 194 F. 643 (9th Cir. 1912). This remained the law until 1915 when it was overruled in *Callahan v. Price*, 146 P. 732 (Idaho 1915). It certainly is any state's right to let riparian or littoral owners hold title to the submerged lands underlying navigable waters. *Shively v. Bowlby*, 152 U.S. 1 (1894). But it is a bit much for petitioner to assert a "special relationship to the Lake" (Pet. Br. 3) when the state long did not claim ownership of submerged lands underlying navigable waters during the period at issue.

stewardship of Lake Coeur d'Alene had been an issue at trial (*compare* Pet. Br. 3-4), the evidence would have shown that petitioner did little to stop the pollution of the Lake and bird-feeding areas by upstream mine waste.[10] If petitioner's asserted regulation of Lake Coeur d'Alene had been an issue at trial, the evidence would have shown that petitioner began regulating encroachment on the Lake only *after* the United States and the Tribe asserted ownership of the Lake more than a quarter-century ago. *Compare* Idaho Code § 58-1301 et seq. (state encroachment permit statute enacted in 1974) *with In re Application for License of the Washington Water Power Company*, Project No. 2545, Federal Power Commission (now FERC) (granting intervention by the United States, April 24, 1973, and intervention by the Tribe, September 14, 1973, to seek relief based on ownership of Lake). In short, especially since it was petitioner who sought and obtained an Order at trial limiting evidence to matters in the nineteenth century, petitioner's assertions in its brief of twentieth-century matters outside the record are improper and misleading and should be disregarded.

21. Canons of Construction. The Court has articulated specific canons of construction under which the foregoing treaties or agreements and statutes are to be construed. It is a longstanding rule that treaties or agreements are to be construed as the Indians would have understood them. *See, e.g., Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675-76 (1979) (an Indian treaty is a "contract between two sovereign nations" in which

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[10] Major ongoing litigation by the Tribe and the United States is seeking to clean up this pollution. *Coeur d'Alene Tribe v. Asarco, et al.*, No. 91-342 (D. Idaho); *United States v. Asarco, et al.*, No. 96-0122 (D. Idaho), *on interlocutory appeal*, 214 F.3d 1104 (9th Cir. 2000). These cases have been consolidated for trial and bifurcated as to some issues. The trial of this multi-billion-dollar case is currently in progress. The state settled a similar claim against many of the same defendants for a mere $4.5 million.

"intention of the parties . . . must control" and must be "construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians").[11] Further, "statutes passed for the benefit of Indians are to be construed liberally in favor of Indians with ambiguous provisions interpreted to their benefit." *South Dakota v. Bourland*, 508 U.S. 679, 687 (1993) (citing *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251, 269 (1992)); *accord Bryan v. Itasca County*, 426 U.S. 373 (1976); *Antoine v. Washington*, 420 U.S. 194 (1975); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918).

SUMMARY OF ARGUMENT

The submerged lands of Lake Coeur d'Alene and the St. Joseph River within the Coeur d'Alene Reservation were reserved for the Tribe under the doctrine announced in *Utah Div. of State Lands v. United States*, 482 U.S. 193 (1987), and reaffirmed in *United States v. Alaska*, 521 U.S. 1 (1997). The clear federal intent was to include the submerged lands in the Reservation and to defeat state title to the submerged lands, thus satisfying the requirements of *Utah* as also reflected in *Alaska*. The submerged lands were also reserved for the Tribe under the alternative analysis announced in *Alaska* of Congress's explicitly recognizing an executive reservation that clearly included the submerged lands. *Alaska*, 521 U.S. at 44. Here, Congress explicitly recognized the reservation in two pre-statehood statutes and also at statehood, and Congress did so after it knew the reservation included the submerged lands. Unless *Alaska* is to be called into question,

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[11] The need for this canon is shown in this case by the fact that federal interpreter Felt, who certified that the 1887 Agreement had been "carefully read and fully explained to the Indians," could not even sign his own name—he signed with "his mark." J.A. 98.

the decisions of the courts below that state title to the submerged lands at issue was defeated should be affirmed.

ARGUMENT

The courts below correctly applied existing precedents in determining that under the particular circumstances of this case the United States defeated state title to submerged lands. There are also several other bases for affirming the judgment below.[12]

I. BY RESERVING THE SUBMERGED LANDS FOR THE TRIBE UNDER THE *UTAH* ANALYSIS AS REAFFIRMED IN *ALASKA*, THE UNITED STATES DEFEATED STATE TITLE.

Applying this Court's precedents to the circumstances of this case establishes that the submerged lands at issue were reserved by the United States for the benefit of the Tribe, thus defeating petitioner's title at statehood.[13] *Utah Div. of State Lands v. United States*, 482 U.S. 193 (1987); *United States v.*

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[12] A basis of the Tribe's ownership of these submerged lands that is not discussed here is the doctrine of unextinguished aboriginal title. The issue was raised below, but neither the district court not the court of appeals found it necessary to reach the issue. *See* Pet. App. 84 n.27 (district court) (explaining that "[i]n light of the Court's conclusion" that the Federal Government retained title, court "need not decide" aboriginal title argument); Pet. App. 13 (court of appeals) (to same effect); Brief in Opposition of Respondent Coeur d'Alene Tribe, at 7 n.4. The Coeur d'Alene Tribe's aboriginal title to the area shown at J.A. 541 was confirmed in *Coeur d'Alene Tribe v. United States*, 4 Indian Claims Commission 1 (1955). The Tribe recognizes, however, that some aspects of its aboriginal title argument may raise questions that are more appropriately addressed in the first instance by the lower courts in this case.

[13] References in this Argument section to the foregoing Statement will simply be by paragraph number (*e.g.*, "Statement ¶ 5").

Alaska, 521 U.S. 1 (1997). The question of whether state title to submerged lands could be defeated by a federal *reservation* of submerged lands was left open in *Utah*, 482 U.S. at 201, and answered in the affirmative in *Alaska*, 521 U.S. at 33-34. These cases establish that a future state's title to submerged lands was defeated by a federal reservation if there could be shown (1) clear intent to include the submerged lands in the reservation and (2) clear intent to defeat state title. *Utah*, 482 U.S. at 202; *Alaska*, 521 U.S. at 36, 41, 44 (Petroleum Reserve), and 50 (Wildlife Refuge). In this case, as in *Alaska*, both prongs of the analysis are satisfied.

A. There Was a Clear Intent to Include Submerged Lands Within the Reservation.

The first prong of the *Utah* analysis—clear intent to include the submerged lands in the reservation—was conceded below by petitioner.[14] *See* Pet. App. 4 n.3 ("For

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[14] *Utah* and *Alaska* analyzed this first prong—intent to include the submerged lands in the reservation—by examining (1) whether the boundary of the reservation was described with reference to water features that necessarily included the submerged lands and (2) whether inclusion of the submerged lands was necessary to accomplish the purposes for which the reservation was created. *Utah*, 482 U.S. at 202; *Alaska* 521 U.S. at 41. In these circumstances, it is appropriate that petitioner has conceded this prong. In this case, the boundary *was* described with reference to water features that necessarily included the submerged lands. *See* Statement ¶ 5. Inclusion of the submerged lands in the reservation was also necessary for the purposes for which the reservation was created. One purpose was to create a homeland for the exclusive use of the Coeur d'Alene people. The Coeur d'Alenes were dependent on the waters for survival, so inclusion of the submerged lands was necessary to accomplish the purpose of creating a homeland for the exclusive use of the Tribe. *See* Statement ¶ 4 (dependence on the water), ¶ 6 (1873 purposes); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 88-89 (1918) (appropriate to include submerged land in Indian Reservation of tribe dependent on fishing). Inclusion of the submerged lands in the reservation was necessary to accomplish the other purposes for which the reservation was created, maintained, and altered because it was the consideration

purposes of this appeal, the State concedes that the 1873 executive order was intended to reserve title to the submerged lands for the benefit of the Tribe"). This concession by petitioner that the 1873 Reservation included the submerged lands applies to the 1887 and 1889 Agreements as well, for there was no change in the 1873 Reservation until Congress acted in 1891. The 1886 statute authorized additional negotiations with the Tribe. It did *not* direct any modification of the 1873 Reservation. *See* Statement ¶ 8. The 1888 Executive notification to Congress that the submerged lands were included as part of the 1873 Reservation did not modify the 1873 Reservation. *See* Statement ¶ 11. The 1889 statute directing additional negotiations to seek cession by the Tribe of mineral and timber lands did not modify the 1873 Reservation or even seek any cession or release of the submerged lands or Lake from the 1873 Reservation. *See* Statement ¶ 13. The 1889 Agreement did provide for an eventual reduction of the Coeur d'Alene Reservation when ratified, but the transcript of the negotiation made clear that even then the submerged lands at issue in this case were to remain part of the Reservation. *See* Statement ¶ 14. The 1890 Statehood Act/Constitution made clear that unextinguished Indian lands, surely including lands such as the 1873 Reservation which had been specifically set apart, were to remain under the absolute ownership and control of the United States. *See* Statement ¶ 17. Even *after* statehood Congress understood the submerged lands to be part of the Reservation when it conveyed "a portion of said reservation" including "all three rivers channels" to Mr. Frederick Post. Statement ¶ 18. Only in March 1891 when the 1887 and 1889 Agreements were ratified was the 1873 Reservation in any way reduced, but even then the submerged lands

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demanded by the Tribe and understood by Congress before the Tribe would agree to the United States' objectives or purposes. *See* Statement ¶ 6 (1873 purposes), ¶ 10 (1886/1887 purposes), ¶ 15 (1889 purposes).

remained part of the Reservation under the 1889 Agreement. *See* Statement ¶ 14. In short, both the Executive and Congress understood at all relevant times that the submerged lands were part of the Coeur d'Alene Reservation.

B. There Was a Clear Intent to Defeat Future State Title to the Submerged Lands.

This second prong of the *Utah* analysis—whether there was a clear intent to defeat a future state's title to the submerged lands—was addressed in *Utah* by examining whether defeat of state title to the submerged lands was necessary to accomplish Congress's goals or objectives. *See Utah*, 482 U.S. at 203, 208 (concluding that defeat of state title to submerged lands in reservation was not necessary to accomplish objective of preventing "monopolization and speculation" of uplands or "subsequently developing a reservoir or water reclamation project"). This second prong of the *Utah* analysis was also addressed in *Alaska* by variously considering (1) whether "Congress was aware" at statehood that the reservation included the submerged lands, *see Alaska*, 521 U.S. at 42 (Petroleum Reserve), 56 (Wildlife Refuge); (2) whether "defeating state title to submerged lands was necessary to achieve the United States' objective," *id.* at 42-43 (Petroleum Reserve), 58-59 (Wildlife Refuge); and (3) whether Congress retained ownership and exclusive jurisdiction at statehood or at least foreclosed state use, *id.* at 41-42 (Petroleum Reserve), 57-59 (Wildlife Refuge). All these considerations—which are not separate tests but rather considerations taken up in *Alaska* to ensure that the analysis of congressional intent is properly focused—are satisfied in this case.

1. Congress Was Aware at Statehood That the Reservation Included Submerged Lands.

In examining the second prong of the *Utah* analysis—whether there was a clear intent to defeat the future state's

title to the submerged lands—the Court in *Alaska* reviewed whether Congress knew that the reservation at issue included the submerged lands. *See Alaska*, 521 U.S. at 42 (Petroleum Reserve), 56 (Wildlife Refuge). In this case, Congress knew in 1888—two years prior to statehood—that the Coeur d'Alene Reservation included the submerged lands. *See* Statement ¶ 11 & n. 5 (discussing 1888 Interior Response to congressional inquiry). After describing the exchange between Congress and the Secretary of the Interior, the district court here pointedly found that Congress was on notice that the submerged lands were part of the Reservation. "It is difficult to imagine a set of circumstances that could with any greater certainty place before Congress the fact that the 1873 reservation included the land beneath the Lake and rivers." Pet. App. 77.

Congress also knew before statehood that Lake Coeur d'Alene and St. Joseph River would remain within the Reservation under the 1889 Agreement. In 1889 the Executive transmitted to Congress documents supporting a request for ratification of the 1887 and 1889 Agreements. J.A. 162-261. This included the transcript of the 1889 negotiations where the United States' negotiator agreed that the Tribe would "still have the St. Joseph River and the lower part of the lake" and a map of the Reservation and cession. Statement ¶ 14 (1889 Agreement Negotiations); J.A. 183 (transcript); J.A. 202 (map). Without question Congress knew at statehood that the Coeur d'Alene Reservation included the submerged lands.

2. Defeat of State Title to Submerged Lands Was Necessary to Achieve the United States' Objective or Purposes.

A second consideration in determining the second prong of the *Utah* analysis—clear intent to defeat the future state's title

to the submerged lands—is whether it was necessary to the government's goals or objectives for state title to the submerged lands to be defeated. For example, in *Utah*, the Court concluded that defeat of a future state's title was not necessary to achieve the federal objectives of preventing "monopolization and speculation" and "subsequently developing a reservoir or water reclamation project." *Utah*, 482 U.S. at 203, 208. By contrast, in *Alaska*, the Court concluded that defeat of state title was necessary as to the Petroleum Reserve at issue there in order to achieve the federal objective of "preserv[ing] the Government's ability to extract petroleum resources," and as to the Wildlife Refuge in order for a federal agency to be able to effect the "preservation of wildlife and wilderness resources." *Alaska*, 521 U.S. at 42, 46 (internal quotation marks omitted). *Alaska* also noted the importance of correctly stating the true government purposes for creating the reservation. *See id.* at 42 (noting that state had misstated federal purpose for creating reservation).

It is appropriate in this case to review the specific federal purposes or objectives in each of the three time periods—*viz.*, in 1873 when the submerged lands were initially reserved, in 1886–1887 when the 1887 Agreement was authorized by Congress and negotiated, and in 1889 when the 1889 Agreement was authorized by Congress and negotiated. Defeat of a future state's title to the submerged lands was necessary to accomplish federal purposes or objectives at each stage, and the 1886 and 1889 statutes should be interpreted in light of this.

There were several federal purposes for creating the Coeur d'Alene Reservation in 1873. One was to create a homeland for the Coeur d'Alenes, a water-dependent people. Defeat of state title was necessary to accomplish this objective because the Coeur d'Alenes relied upon their fishery and other water resources for survival. *See* Pet. App. 49-54; Statement ¶¶ 1, 4. The other federal purposes in 1873 were "promoting

settlement, avoiding hostilities and extinguishing aboriginal title."[15] Pet. App. 61; *accord* Statement ¶ 6. These federal purposes or objectives could only be achieved if the Tribe agreed to them, and that required, as the district court stated, "the Federal Government['s] . . . agreeing to a reservation that included the submerged lands." Pet. App. 61. And just as accomplishing these goals required inclusion of the submerged lands in the Reservation, so too did it require defeat of the future state's title to these submerged lands. Again, tribal assent was necessary to furthering these federal objectives, and, from the Tribe's perspective, not intending to defeat the future state's title would have been the same as *excluding* the Lake from the reservation in the first place. In either case, the Tribe would have been relegated to a permissive-use or common-interest status with regard to the Lake. This is what the evidence showed was unacceptable to the Tribe. *See* J.A. 30 (surveyor's letter); Pet App. 52 (findings regarding surveyor's letter); J.A. 38-41 (Governor Bennett's letter); Pet. App. 56-58 (findings regarding Governor Bennett's letter); Statement ¶ 6 (summarizing this evidence and these findings). Defeat of the future state's title to the submerged lands in the 1873 Reservation was thus necessary to accomplish the United States' purposes or objectives.

In 1886–1887, the federal goals were set out on the face of the 1886 statute authorizing negotiations. Those federal goals were (1) to obtain the Coeur d'Alenes' consent to neighboring tribes relocating on the Coeur d'Alene Reservation, and (2) to obtain the "cession of [Coeur d'Alene] lands outside the limits of the *present* Coeur d'Alene reservation to

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[15] Petitioner's discussion of the purposes of the 1873 Reservation completely ignores these three federal purposes which the district court found could be accomplished only by including the submerged lands in the 1873 Reservation. *See* Pet. Br. 44-48.

the United States."[16] J.A. 50-51 (emphasis added). The reference to the "present" reservation evidences a congressional realization that the only way the United States could accomplish its objectives was to leave intact the 1873 Reservation and everything included in it. *See* Statement ¶ 10 (1886–1887 purposes).

In 1889 the federal goals were again set out on the face of a negotiation authorization statute. They were to obtain mineral and timber lands.[17] *See* J.A. 144; Statement ¶ 13 (negotiation authorization statute), ¶ 15 (1889 purposes). In the exchange between Chief Seltice and 1889 negotiator General Simpson, the Tribe expressly rejected the same type of ownership status for the Lake as would result if the submerged lands passed to the state at statehood:

> General SIMPSON. . . . . You understand that the lake belongs to you as well as to the whites—to all, every one who wants to travel on it.
>
> [Chief] SALTISE. That is your idea about the boundary. You know we do not understand papers; in taking it that way we will not know the boundaries.

J.A. 183; Statement ¶ 14. The Coeur d'Alenes, who the district court found were "[k]nown for their sagacity," Pet. App. 74, demonstrated in this exchange their rejection of a permissive-use or common-interest status for the Lake. General Simpson, seeing that he could not achieve his

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[16] Here, too, petitioner completely ignores the expressed congressional goals and the clear way Congress dealt with them. *See* Pet. Br. 44-48.

[17] Petitioner acknowledges only in passing these express statutory goals of obtaining mineral and timber lands in the 1889 negotiation authorization act. Pet. Br. 46. Instead, petitioner urges that Congress's goal in the 1889 statute was to "protect the Tribe's agricultural lands." *Id.* But the only protection of the Tribe's agricultural interests in the statute was that the federal negotiators were told to leave the farmland alone. *Id.* This is not protection; it is simply a directive to do no damage.

objective of the cession of the mineral and timber lands if he insisted on such a status for the Lake, changed his approach immediately and dramatically. The following is his response to Chief Seltice's foregoing statement:

> General SIMPSON. You all know where the St. Joseph River is. We do not want any of that. I will explain the boundaries: [boundary description omitted here].
>
> *Now if we buy this land you still have the St. Joseph River and the lower part of the lake and all the meadow and agricultural land along the St. Joseph River.*

J.A. 183 (emphasis added); *see* J.A. 538, 540 (maps showing boundaries described as to Lake and St. Joseph River identical to boundaries eventually agreed upon) *and* J.A. 202 (map of Reservation after 1889 cession, attached to 1889 Executive Report to Congress regarding 1887 and 1889 Coeur d'Alene Agreements). In these circumstances, it is clear that defeat of state title would be necessary for the United States to accede to the Tribe's rejection of the common-interest status such as would result from ownership of the Lake passing to the state at statehood. Furthermore, General Simpson's specific reference to the land surrounding the St. Joseph River ("meadow and agricultural land along the St. Joseph River") makes clear that the earlier references to the St. Joseph River were to the river itself. Ownership of the Lake and St. Joseph River thus was part of the consideration demanded by the Tribe in exchange for ceding the mineral and timber lands sought by Congress.[18] *See* Statement ¶ 15. As the district court stated:

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[18] Petitioner suggests (Br. 47) that defeat of state title would not be necessary to acomplish a federal purpose of providing "fishing opportunities for the Coeur d'Alene Tribe" because tribal members could fish under state ownership and regulation. The argument fails because something very different was bargained for and agreed to as the consideration required to acomplish Congress's specific purposes as

> Retention of the submerged lands was necessary to achieve the United States' objective, [*Alaska*, 117 S.Ct.] at 1910 [521 U.S. at 42-43], and Congress clearly contemplated continued federal ownership of those lands, *id.* at 1917 [521 U.S. at 55-59]. The 1889 agreement by its terms anticipates that the Tribe will remain the beneficial owner of the southern third of the Lake. The northern boundary line of the diminished reservation was drawn so as to bisect the Lake, and the minutes of the 1889 negotiations confirm that the placement of the boundary line was for the purpose of establishing the Tribe's rights to the Lake and rivers. This is compelling evidence that the United States intended for the Tribe to hold a beneficial interest in the submerged lands under the southern third of the Lake. Congress could not have carried into effect the terms of the 1889 agreement without retaining title to the submerged lands. Congress clearly demonstrated [in 1889] its intent to reserve the submerged lands under federal control by ratifying the Executive inclusion of the submerged land within the 1873 reservation. *See Alaska*, 117 S. Ct. at 1910-11, 1915-17 [521 U.S. at 43-45, 53-59].

Pet. App. 80-81 (citation and footnote omitted).

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shown by the above-quoted exchange between General Simpson and Chief Seltice. In other words, the agreement was that the Lake and river would be part of the Reservation not subject to any other regulatory authority or use. *Compare Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962) (barring state regulation of tribal fishing in waters reserved for the tribe in *Alaska Pacific Fisheries*, 248 U.S. 78 (1918)). Defeat of state title and regulatory authority over these waters was the consideration demanded and offered to accomplish Congress's purposes in 1889.

In short, defeat of state title to the submerged lands was necessary to achieve the United States' objectives or purposes.[19]

3. Congress Kept Exclusive Jurisdiction Over and Ownership of the Reservation in the Idaho Statehood Act.

The third consideration used in *Alaska* in assessing the second prong of the *Utah* analysis—clear intent to defeat the future state's title to the submerged lands—is whether Congress kept ownership of and jurisdiction over the reservation at statehood. *See Alaska*, 521 U.S. at 41-42 (Petroleum Reserve), 56 (Wildlife Refuge). In this case, as in *Alaska*, Congress retained ownership of and jurisdiction over the Reservation. Specifically, Article XXI, § 19 of the Idaho Constitution (J.A. 371-72), which Congress ratified in the Idaho Statehood Act (J.A. 370), is a disclaimer by Idaho of Indian land:

> [T]he people of the state of Idaho do agree and declare that we *forever disclaim* all right and title . . . *to all lands* lying within said limits *owned or held* by any Indians or Indian tribes; and until the title thereto shall have been extinguished by the United States, the same shall be subject to the disposition of the United States, and said *Indian lands* shall remain *under the absolute jurisdiction and control* of the Congress of the United States . . . .

J.A. 371 (emphasis added). There can be no doubt that the Coeur d'Alene Reservation, which had been specifically "set apart as a reservation for the Coeur d'Alene Indians" by

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[19] Amici Counties suggest (Br. 22-23) that a "public exigency" is required for Congress to be able to defeat state title. First, *Alaska* made clear that public exigency is only a congressional policy, not a constitutional requirement. *Alaska*, 521 at 40. Second, the district court explained why any public-exigency requirement was satisfied in this case. Pet. App. 60-61.

Executive Order, J.A. 47-48, was "held by any Indians or Indian tribes" or that it was "Indian lands" as referred to in the Idaho Constitution. Article 5 of the 1887 Agreement stated that the "Coeur d'Alene Reservation shall be *held* forever as *Indian land*." J.A. 93 (emphasis added). In these circumstances, the Idaho Statehood Act, ratifying the Idaho Constitution, disclaimed both ownership and jurisdiction as to the Coeur d'Alene Reservation, just as the Alaska Statehood Act disclaimed ownership and jurisdiction as to the two reservations in *Alaska*.[20]

The disclaimer does not turn, with regard to the Coeur d'Alene lands, on whether Congress had yet finally acted to approve the 1887 and 1889 Agreements. In this regard, it is helpful to recall that the reservation of the Wildlife Reserve in *Alaska* had not even been finalized at statehood. *Alaska*, 521 U.S. at 59. There was merely an application for a reservation. Here, as just recounted, there is much more. The Coeur d'Alene Reservation had been completely reserved by Executive Order and further had been expressly recognized by Congress several times, twice after learning that the submerged lands were included in the Reservation. J.A. 137-40 (1888 WIRR right-of-way statute); J.A. 144 (1889 negotiation authorization statute). Just as the disclaimer in *Alaska* was not limited to "completed reservations," *Alaska*, 521 U.S. at 59, so too the Indian disclaimer here is not limited to reservations where Congress

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[20] This Court found a similar state disclaimer of Indian lands, coupled with a prior reservation, to defeat state regulatory authority which would have existed if the state had owned the submerged lands. *Metlakatla Indian Community, Annette Island Reserve v. Egan*, 369 U.S. 45, 57-59 (1962) (holding reservation of submerged lands addressed in *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918), coupled with Indian disclaimer clause in Alaska Statehood Act, defeated state's ability to regulate fish traps on submerged lands). *Compare Kake v. Egan*, 369 U.S. 60 (1962) (reaching opposite result where there was no prior reservation).

had already *conveyed* title to a tribe (as would subsequently occur in this case in 1891, *see supra* Statement ¶ 18; *infra* Part II.B.3, when Congress ratified the 1887 and 1889 Agreements), but includes, as just recounted, the Tribe's Executive Order reservation of which Congress was aware.

* * * *

In summary, the facts of this case establish that future state title to the submerged lands at issue was defeated by Congress under both prongs of the *Utah* reservation analysis used in *Utah* and *Alaska*. The first prong was conceded by petitioner below. The second prong was satisfied by Congress's being informed that the Reservation included the submerged lands, by the fact that defeat of state title to the submerged lands was necessary to accomplish the federal purposes and objectives, and by the federal government's keeping ownership of and jurisdiction over the Reservation at statehood. Congress's intent that the submerged lands be included in the Reservation and state title be defeated has been "definitely declared or otherwise made very plain." *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926). The presumption of state ownership of submerged lands has thus been overcome.

II. THE UNITED STATES RESERVED THE SUBMERGED LANDS FOR THE BENEFIT OF THE TRIBE UNDER THE ALTERNATIVE *ALASKA* ANALYSIS.

Although the foregoing adequately supports affirmance of the judgment, other grounds exist as well. In particular, in *Alaska* this Court articulated an alternative method for analyzing whether state title to submerged lands had been defeated by an Executive reservation. Specifically, after setting forth the foregoing test—stating that "there would have been no barrier to Congress retaining a petroleum reserve, including submerged lands, at the point of Alaska's

statehood, provided it satisfied *Utah Div. of State Lands*' requirements of demonstrating a clear intent to include submerged lands within the Reserve's scope and a clear intent to defeat Alaska's title"—the Court in *Alaska* also stated thus: "It follows that Congress could achieve the same result [of defeating state title to submerged lands] by explicitly recognizing, at the point of Alaska's statehood, an executive reservation that clearly included submerged lands." *Alaska*, 521 U.S. at 44. This is, in fact, the analytical approach applied by the district court and the court of appeals. Pet. App. 78-81 & n.25 (district court); Pet. App. 21-23 (court of appeals).

A. Congress Was Notified That the Executive Reservation Clearly Included Submerged Lands.

In *Alaska*, the Court first looked at whether "Congress [was] on notice that the President had construed his reservation authority to extend to submerged lands and had exercised that authority to set aside uplands and submerged lands." *Alaska*, 521 U.S. at 45. This point is beyond dispute in this case. In 1888, two years before statehood, the Department of the Interior informed Congress that the submerged lands were part of the Reservation. *See* Statement ¶ 11. A second *pre-statehood* notice to Congress that the submerged lands had been included in the Coeur d'Alene Reservation was the 1889 Message from the Executive to Congress contained in the documents supporting ratification of the 1887 and 1889 Agreements. *See* J.A. 162-261; Statement ¶ 14. It included the transcript of the 1889 negotiation exchange between Chief Seltice and General Simpson previously quoted showing that the parties' intent had been and continued to be that the submerged lands were part of the Reservation. J.A. 182-83; *see* Statement ¶ 14; *supra* pp. 32-33. *Further, the map attached to this Executive report to Congress even showed the reservation boundary*

bisecting the Lake, including the southern part of the Lake and lower St. Joseph River in the Reservation. See J.A. 202; *compare Alaska*, 521 U.S. at 56 (discussing map provided to Congress showing submerged lands in Wildlife Refuge). Without doubt these documents gave Congress *pre-statehood* notice "that the President had construed his reservation authority to extend to submerged lands and had exercised that authority to set aside uplands and submerged lands" in the 1873 Executive Order Coeur d'Alene Reservation. *Alaska*, 521 U.S. at 45.

B. Congress Explicitly Recognized the Coeur d'Alene Reservation Both Before and at Statehood.

Congress "explicitly recogniz[ed]," *Alaska*, 521 U.S. at 44, the Coeur d'Alene Reservation twice before statehood and again at statehood. *See* Statement ¶ 12 (discussing Act of May 30, 1888, 25 Stat. 160, J.A. 137-40 (pre-statehood statute granting railroad right of way through the Coeur d'Alene Reservation)); Statement ¶ 13 (discussing Act of March 2, 1889, 25 Stat. 980, 1002, J.A. 144 (pre-statehood statute authorizing negotiations with Coeur d'Alenes for the cession of some of the land in their reservation)); Statement ¶ 17 (discussing Act of July 3, 1890, 26 Stat. 215 ch. 656, J.A. 370-372 (statehood statute ratifying state Constitution which disclaimed ownership of and jurisdiction over Indian land)).[21] The district court and court of appeals both based their decisions on the 1889 negotiation authorization statute. Pet. App. 78-79 (district court); Pet. App. 21-23 (court of

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[21] Amici Counties suggest (Br. 21) that President Grant had no authority to issue the 1873 Executive Order, citing an Attorney General's Opinion predating President Grant's Order. This argument not only was not raised below and not only flies in the face of concessions by the party that *amici* support, but also is beside the point because of the three express congressional recognitions of the Executive Order Coeur d'Alene Reservation that are cited in the text immediately preceding this footnote.

appeals). Any one of these three recognitions of the Reservation satisfies the explicit-congressional-recognition standard of *Alaska*.[22]

1. Congress Explicitly Recognized the Coeur d'Alene Reservation *Before Statehood* After It Knew the Submerged Lands Were Included in the Reservation.

Twice before statehood Congress explicitly recognized the Coeur d'Alene Reservation *after* it knew the Reservation included the submerged lands. On February 9, 1888, the Secretary of the Interior responded to Congress that most of Lake Coeur d'Alene—along with the Coeur d'Alene and St. Joseph Rivers—was in the Coeur d'Alene Reservation and could probably be released through further negotiation and payment. J.A. 118-36. Congress expressly recognized the Coeur d'Alene Reservation three months after Congress was thus informed that the Reservation included the submerged lands: On May 30, 1888, Congress specifically recognized the Reservation when a statute was passed granting the Washington and Idaho Railroad a right of way through the

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[22] Amici Counties suggest (Br. 15) that prior congressional authorization is required before the Executive can reserve submerged lands and that such authority existed in *Alaska*, 521 U.S. at 41-42. Amici are wrong on both counts. This Court in *Alaska* assumed that the state's argument was correct that the Pickett Act did not authorize the Executive's reservation of the Petroleum Reserve, but still found the state's title to the submerged lands had been defeated. *Alaska*, 521 U.S. at 43-44. In all events, in this case there was prior congressional authorization for the Executive to treat with northwest Indian tribes such as the Coeur d'Alenes. *See* Statement ¶ 2 (discussing Act of March 3, 1853, 10 Stat. 238 (authorizing treaty negotiations), App. 3a to this Brief). Prior to statehood Congress noted that the intent had been to treat with the Coeur d'Alenes in 1855, but circumstances prevented it. J.A. 265-66 (Committee statement), 335-44 (Mullan letter). In this case there thus was greater congressional authorization for the Executive's reservation than in *Alaska*.

Coeur d'Alene Reservation, conditioned upon the railroad's obtaining tribal consent and making appropriate payment to the Tribe. *See* Statement ¶ 12; Act of May 30, 1888, 25 Stat. 160, J.A. 137-40 ("An act granting to the Washington and Idaho Railroad Company the right of way through the Coeur d'Alene Indian Reservation").[23] The second pre-statehood congressional recognition of the Coeur d'Alene Reservation *after* Congress knew the Reservation included the submerged lands was in 1889, when Congress statutorily authorized negotiations with the Coeur d'Alene Tribe to seek "the purchase and release by said tribe of such portions of *its reservation* not agricultural and valuable chiefly for mineral and timber as such tribe shall consent to sell." Act of Mar. 2, 1889, 25 Stat. 980, 1002, J.A. 144 (emphasis added).

Both of these statutes recognized the Tribe's particular interest in the reservation by requiring both consent and payment before land or an interest in land could be purchased from the Tribe.[24] As the district court stated, "[b]y

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[23] The first time that the Coeur d'Alene Reservation was explicitly recognized by Congress was two years earlier in 1886 when Congress authorized negotiations with the Coeur d'Alenes to obtain their consent for the "removal" of neighboring tribes to the "Coeur d'Alene reservatio[n]" and to negotiate with the Coeur d'Alenes for cession "of their lands outside the limits of the *present* Coeur d'Alene reservation to the United States." Act of May 15, 1886, 24 Stat. 29, 44, J.A. 50 (emphasis added). However, this 1886 congressional recognition of the Coeur d'Alene Reservation is insufficient to establish the congressional-recognition element, just as the congressional action in *Utah* was insufficient, because when it was taken, "Congress was not on notice that [the Executive] had reserved the bed of the lake." *Alaska*, 521 U.S. at 44-45 (explaining why United States' claimed reservation of Utah Lake was rejected in *Utah*).

[24] Petitioner contends that the Tribe's interest in the Reservation was mere use and occupancy, suggesting it was nothing more than a generalized recognition of the Tribe's aboriginal rights. Pet. Br. 42-44. Congress's requirement of consent and payment indicates it understood the Tribe to have a greater legal interest in the Reservation.

authorizing the Federal Government to negotiate with the Tribe for a release of the submerged lands, Congress [in 1889] acknowledged that the Executive Order of 1873 had effectively conveyed beneficial ownership of those lands to the Coeur d'Alenes. Accordingly, the Court concludes that Congress recognized and then ratified the Executive reservation of the submerged lands for the benefit of the Tribe." Pet. App. 78. The court of appeals also carefully articulated Congress's recognition and acknowledgment of the Coeur d'Alene Reservation in the 1889 negotiation authorization statute:

> The express reference to the reservation as *the Tribe's reservation*, explicit recognition that the choice to sell was the Tribe's, and reference to *tribal release* of portions of *its reservation* all manifest an awareness and acceptance by Congress of the boundaries of the 1873 reservation—boundaries that included submerged lands. This series of events indicates that Congress accepted the Secretary's advice to leave any cession up to negotiations. Indeed, the fact that Congress decided to make its authorization open-ended reinforces the district court's conclusion that Congress recognized and accepted the Tribe's beneficial ownership of all lands—including submerged lands—within the 1873 reservation . . . .
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> In short, Congress "otherwise made very plain," *Holt State Bank*, 270 U.S. at 55, its intention regarding the submerged lands . . . . Although Congress may have been unhappy to learn that the executive reservation included submerged lands, its actions show recognition and acceptance of the passage of beneficial ownership to the Tribe, for it sought to *regain* as much submerged land as possible.

Pet. App. 21-23 (emphasis in original). These two pre-statehood statutes are express congressional recognition of

the Coeur d'Alene Reservation *after* Congress knew the Coeur d'Alene Reservation included the submerged lands.

Petitioner and Amici Counties, by contrast, urge a standard that was not articulated in *Alaska* and that would not have allowed the result in *Alaska*. They suggest that the statute in which Congress acknowledges a reservation that it knows includes submerged lands must specifically refer to submerged lands. *See* Pet. Br. 40-42; Amici Counties Br. 22. Not only is this not what *Alaska* held, but if it were the standard, *Alaska* would have had a different result. In particular, as to the Petroleum Reserve in *Alaska*, Congress in § 11(b) of the Alaska Statehood Act made *no reference* to the submerged lands, only referring to the reservation "naval petroleum reserve numbered 4." *Alaska*, 521 U.S. at 41. This is a reference to "a 23-million acre federal reservation in the northwestern part of the State," *id.* at 32, and not "an express reference to submerged lands," as petitioner apparently believes, Pet. Br. 40. *See also Alaska*, 521 U.S. at 38-42 (making clear that Alaska Statehood Act does not *on its face* refer to submerged lands in Petroleum Reserve). Nonetheless, Congress was held to have defeated state title. The same is true here. The statutes in this case, which referred only to the reservation, meet the *Alaska* standard. *See* J.A. 137 (railroad right-of-way statute referring to "Coeur d'Alene Indian Reservation"); J.A. 144 (1889 negotiation authorization act referring to "its [*i.e.*, Coeur d'Alene Tribe's] reservation").

In short, in both the 1888 railroad statute and the 1889 negotiation authorization statute, Congress "explicitly recognized" the Coeur d'Alene Reservation, which was an "executive reservation which clearly included submerged lands." *Alaska*, 521 U.S. at 44.

2. Congress Explicitly Recognized the Coeur d'Alene Reservation *At Statehood* After It Knew the Submerged Lands Were Included in the Reservation.

Congress also explicitly recognized the Coeur d'Alene Reservation at statehood, again after it knew the Reservation included the submerged lands. As discussed above, Congress knew prior to statehood that the submerged lands were included in the Reservation. *See* Statement ¶ 11 (1888 Interior response to congressional inquiry whether submerged lands were in reservation); Statement ¶ 14 (1889 negotiation transcript showing submerged lands were to remain in reservation). On July 3, 1890, Congress "accepted, ratified, and confirmed the Idaho Constitution" and "declared" Idaho to be a state. Idaho Statehood Act/Constitution, Act of July 3, 1890, 26 Stat. 215 ch. 656, J.A. 370-71; Statement ¶ 17. Article XXI, § 19 of the Idaho Constitution, ratified simultaneously with and as part of the grant of statehood, disclaimed title to land "owned or held" by any Indian tribe and disclaimed jurisdiction over "Indian land," with "absolute jurisdiction and control" remaining in Congress:

> [T]he people of the state of Idaho . . . [f]orever disclaim all right and title . . . to all lands lying within said limits owned or held by any Indians or Indian tribes; and until the title thereto shall have been extinguished by the United States, the same shall be subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States . . . .

J.A. 371 (Idaho Constitution, Article XXI § 19).

This specific recognition of federal ownership of and jurisdiction over the Coeur d'Alene Reservation has the same operative effect as the provisions of § 11(b) of the Alaska Statehood Act as to the Petroleum Reserve. In *Alaska*, this

Court held that "Section 11(b) of the Alaska Statehood Act, which noted that the United States owned the Reserve and which included the statement of exclusive legislative jurisdiction under the Enclave Clause, reflects Congress' intent to ratify the inclusion of submerged lands within the reserve and defeat the State's title to those lands." 521 U.S. at 46. *Alaska* reached the same conclusion as to the Wildlife Refuge as well, this time based on § 6(e) of the Alaska Statehood Act. Specifically, the Court held that "Section 6(e) of the Alaska Statehood Act expressly prevented lands that had been 'set apart as [a] refug[e]' from passing to Alaska." *Alaska*, 521 U.S. at 61. In all three disclaimers—the two in *Alaska* and the one here—ownership and jurisdiction were disclaimed by the state. This is sufficient to defeat state title to submerged lands where Congress knew, at the time of statehood, that the submerged lands were included in the reservation. *See id.* at 46 (Petroleum Reserve); *id.* at 61 (Wildlife Reserve). State title to the submerged lands at issue here was similarly defeated by Congress's ratification in the Idaho Statehood Act of the state's disclaimer.

3. Congress's Post-Statehood Actions Reflect the Fact That It Had Previously Defeated State Title to the Submerged Lands.

Congress completed its ratification of the 1887 and 1889 Agreements in March 1891, eight months after statehood.[25]

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[25] In ratifying these two Agreements, Congress conveyed or granted the Reservation to the Tribe. Congress thereby granted to the Tribe a greater property interest in the Reservation than was conveyed to many other tribes. Often grants to Indian tribes by treaty or agreement conveyed only the right of use and occupancy. In approving the 1887 Agreement, by contrast, Congress conveyed to the Tribe a right that the Reservation could not be "sold . . . or otherwise disposed of without the consent of the Indians residing on said reservation." J.A. 379 (Article 5 of 1887 Agreement in ratification statute). This is in the nature more of fee title than of mere possessory interest of use and occupancy. *See Montana v. United States*, 450 U.S. 544, 555 n.5 (1981) (distinguishing the

Amici Counties suggest (Br. 22) that this post-statehood ratification "implies that Congress did not intend to defeat Idaho's title to the beds of navigable waters." The circumstances of this case suggest just the opposite. Congress's ratification of the two Agreements demonstrates Congress's understanding that it had previously defeated state title to the submerged lands. That is the only way the House of Representatives' Committee Reports could accurately state —both before *and after* statehood—that the intent of the pending bill was to ratify the 1887 and 1889 Agreements "in strict conformity with the request of said Indians," which the 1889 transcript made clear required including the submerged lands.[26] J.A. 270 (pre-statehood report); J.A. 374 (post-statehood report reflecting fact of identical text); J.A. 183 (1889 transcript showing tribal understanding that submerged lands would be included in the Reservation); *see also* Statement ¶ 6 (1873 purposes), ¶ 10 (1886/1887 purposes), ¶ 15 (1889 purposes).

The relevance of Congress's action in 1891 is not that Congress then defeated state title: Congress had already done that in its 1888 railroad statute or in its 1889 negotiation-authorization statute or, at a minimum, in its 1890 statehood statute. In the 1891 statute, Congress merely conveyed that which had already been reserved and to which Congress had

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circumstances with the Crow Tribe, where only a possessory interest in reservation was conveyed and state title to submerged lands was not defeated, from circumstances in *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), where fee title was conveyed and state title to the submerged lands was defeated). Petitioner's argument (Br. 42-44) that the Tribe's interest is merely one of "use and occupancy" is thus not correct.

[26] This report that the purpose of the statute was to ratify the Agreements "in strict conformity with the request of said Indians as recited in said treaties" is in keeping with the canons of construction that Indian treaties are to be interpreted as the Indians would have understood them. *See* Statement ¶ 21; *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. at 675-76 (1976).

already defeated state title. There is no reason to construe the various congressional acts (of 1888, 1889, 1890, and 1891) so as to conclude that Congress was undertaking a vain exercise when as part of its 1891 approval of the 1887 and 1889 Agreements it made clear that the Tribe had authority over the submerged lands at issue here. *See* Statement ¶ 18 (describing 1891 Act). Yet that is the construction that petitioner requires to win this case.[27]

That Congress intended *at or before* statehood to *defeat* state title to the submerged lands and *after* statehood to *convey* most of the lands to the Tribe is also made plain by Congress's direction in 1891 (in the ratification statute) that a patent be issued to Frederick Post for "a portion of said [Coeur d'Alene] reservation" that "included all three of the river channels" in the navigable Spokane River. J.A. 388 (authorization statute); *see* Statement ¶ 18 & n.7 (discussion of Frederick Post patent). Here, too, Congress was conveying land to which it had already preserved federal title. Finally, the 1893 congressional act authorizing the 1894 Harrison cession, in which the Tribe ceded a portion of the Lake, is a further reflection of the understanding of all at the time that

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[27] There is no analogue in *Alaska* to the 1891 statute in this case because in *Alaska* Congress never intended to convey the reserved lands; its purpose was to retain them for the United States. As a separate matter, it could also be suggested that, even though the ratification of the 1887 and 1889 Agreements occurred after statehood, the operative effect of those Agreements regarding the submerged lands related back to their date of execution in 1887 and 1889. The operative language in each Agreement was merely that they would "not be binding" until ratified. J.A. 96 (1887 Agreement); J.A. 199 (1889 Agreement). Relation back of these Agreements once ratified would be in keeping with the decisions in *Northern Pacific R.R. v. Wismer*, 246 U.S. 283, 288 (1918) (executive order creating Indian reservation effective on date of original agreement, not later date of issuance of Order), and *Buttz v. Northern Pacific R.R.*, 119 U.S. 55, 69-70 (1886) (agreement with Indian tribe "to be binding from its ratification" held to be effective from date approved by Executive branch, not later date of congressional ratification).

Congress had previously defeated state title. Statement ¶ 19 (Harrison Cession). As the district court found, "[a] cession that included the lake bed [at Harrison] would not have been necessary if title to the submerged lands had passed to Idaho at statehood." Pet. App. 85.

* * * *

In summary, *Alaska* establishes that state title to submerged lands is defeated "by explicitly recognizing, at the point of [the State's] statehood, an executive reservation that clearly includes submerged lands." 521 U.S. at 44. In this case, Congress was notified prior to statehood that the Executive "had construed his reservation authority to extend to submerged lands and had exercised that authority to set aside uplands and submerged lands." *Compare id.* at 45. Possessed of this knowledge, Congress expressly recognized the Coeur d'Alene Reservation twice before statehood and once at statehood. Congress's intent that the submerged lands be included in the Reservation and state title defeated has been "definitely declared or otherwise made very plain." *Holt State Bank*, 270 U.S. at 55. The presumption against state ownership of submerged lands has been overcome.[28]

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[28] Amici Counties (Br. 25-28) suggest that the Tribe claims a right improperly to prohibit or regulate use of the Lake. In fact, non-tribal use of the Lake is guaranteed by the 1858 Peace Treaty, J.A. 24 (promise of Coeur d'Alenes that "all white persons shall travel through their country unmolested"), and by the predominant doctrine of navigational servitude, *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700, 707-08 (1987) (explaining that the federal doctrine of navigatitional servitude is applicable to navigable waters held to be tribally owned in *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970)). Furthermore, the Tribe is not prohibiting use of the Lake, but it is appropriately regulating the Lake. *See* Coeur d'Alene Tribal Code Chapter 20 (fishing), 42 (Water Quality), 43 (Boating), and 44 (Encroachments) (2000 edition); *see also supra* p. 23 n.10 (demonstrating that Tribe has played leading role in seeking to force environmental clean-up of the Lake).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

No. CV-94-00328-EJL

UNITED STATES OF AMERICA, *et al.*,
Petitioner,

v.

IDAHO,
Defendant.

SUPPLEMENTARY RELEVANT DOCKET ENTRIES

NO.	DATE	DESCRIPTION
131	7/09/1998	ORDER by Honorable Edward J. Lodge granting in part motion to strike listed pla's exhibits and conditional withdrawal of listed State exhibits [119-1] (See order for list of exhibits to be striken) (cc: all counsel) [Date Entered: 07/10/98, By: dkh]
129	2/06/1998	NOTICE OF MOTION DETERMINATION PROCEDURE- motion to strike listed pla's exhibits and conditional withdrawal of listed State exhibits [119-1] will be decided on written submissions (cc: all counsel) [Date Entered: 02/09/98, By: dkh]
128	1/22/1998	RESPONSE by Coeur d'Alene Tribe to motion to strike listed pla's exhibits and conditional withdrawal of listed State exhibits [119-1] [Date Entered: 01/26/98, By: dkh]

DATE	No.	DESCRIPTION
127	1/22/1998	RESPONSE by pla USA to motion to strike listed pla's exhibits and conditional withdrawal of listed State exhibits [119-1] [Dated Entered: 01/23/98, By: dkh]
119	1/08/1998	MOTION by Idaho, State of to strike listed pla's exhibits and conditional withdrawal of listed State exhibits [Date Entered: 01/09/98, By: dkh]

APPENDIX B

STATUTES

THIRTY-SECOND CONGRESS. SESS II CH. 104 1853

Act of March 3, 1853
10 Stat 238

CHAP. CIV.—*An Act making Appropriations for the current and contingent Expenses of the Indian Department, and for fulfilling Treaty Stipulations with various Indian Tribes, for the year ending June thirtieth, one thousand eight hundred and fifty-four.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be and are hereby appropriated, out of any money in the Treasury not otherwise appropriated, for the purpose of paying the current and contingent expenses of the Indian Department, and fulfilling treaty stipulations with the various Indian tribes.

Negotiations with Indians west of Missouri and Iowa.

SEC. 2. *And be it further enacted*, That the President of the United States be, and he hereby is, authorized, immediately after the passage of this act, to enter into negotiation with the Indian tribes west of the States of Missouri and Iowa for the purpose of securing the assent of said tribes to the settlement of the citizens of the United States upon the lands claimed by said Indians, and for the purpose of extinguishing the title of said Indian tribes in whole or in part to said lands and that, for the purpose of carrying into effect the provisions of this section, the sum of fifty thousand dollars is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated.

APPENDIX C

TRIAL EXHIBIT *2254*

DEPARTMENT OF THE INTERIOR
OFFICE OF INDIAN AFFAIRS

Washington, June 25, 1902

The Honorable

The Secretary of the Interior.

Sir:

The office has the honor to invite your attention to the matter of the application of the St. Joe Boom Company, Limited, of Coeur d'Alene, Idaho, for the privilege of constructing and maintaining logging and sorting booms on the Coeur d'Alene Lake and in St. Joe River, within the limits of the Coeur d'Alene Indian reservation, Idaho.

In connection with this matter the attention of the Department is invited to two reports of this office dated March 7, 1902, upon the respective applications of C.R. Smith, et al., and of the St. Joe Boom Company for the privilege of constructing and maintaining log booms at the head of Coeur d'Alene Lake and in the St. Joe River, near its outlet, said applications and the maps accompanying the same having been referred to the Interior Department by the Secretary of War with the request for the views of this office thereon.

Under date of April 7, 1902, William T. S. Curtis, an attorney for the St. Joe Boom Company, residing in this city, addressed a letter to this office setting forth that the St. Joe Boom Company had in accordance with a conference by its representatives with officials of this Department and of the

War Department gone to considerable expense in making surveys and preparing maps etc., and had made formal application to the Secretary of War for the privilege indicated; that he was subsequently advised that other parties, viz., C.R. Smith, et al., had filed an application for similar privileges in direct conflict with the rights of the St. Joe Boom Company and their vested interests, and that the petitioners believe that the application of the other parties named was not made in good faith or in furtherance of any labors performed, as in the case of the St. Joe Boom Company.

Mr. Curtis accordingly protested against the granting of any boom privileges to other than the St. Joe Boom Company, and requested that all action on the subject be held in abeyance until said company should have had opportunity to present in more detailed form its reasons showing why its application should be granted to the exclusion of other applicants.

On April 29, 1902, Mr. Curtis addressed another letter to this office in which he requested that the matter of the application of the St. Joe Boom Company be referred to U.S. Indian Agent A.M. Anderson for further report as to the question of the advisability of granting such application, and whether or not, if granted, it would be detrimental to the rights of the Indians.

By letter of May 2, 1902, Hon. J.H. Davidson addressed a letter to this office stating that he had been authorized by C.R. Smith, et al., who had recently filed application for the erection and maintenance of a boom for sorting and rafting logs on Lake Coeur d'Alene and the St. Joe River, Idaho, to respectfully request that no further consideration be given to their application for such permission, but that favorable action, if possible, be taken upon the application of the St. Joe River Improvement Company (St. Joe Boom Company ?) for

the erection and maintenance of a boom at practically the same place as originally asked for by said Smith and others.

The office accordingly, under date of May 10, 1902, wrote to Agent Anderson, of the Colville Agency, enclosing said letter of Mr. Curtis, dated April, 29, 1902, and of Representative Davidson, dated May 2, 1902, and stated that Mr. Curtis had informally advised the office that the object of the St. Joe Boom Company in asking to have the matter referred to Agent Anderson was to save time,—the opposition on the part of the Indians being the one obstacle in the way, now that the Smith people had withdrawn their request for permission to construct a boom. The office stated that it had no objection to Agent Anderson taking up the matter with the St. Joe Company whenever they were prepared to submit their case.

He was requested to report to the office his conclusions and recommendations in the premises. In conclusion it was remarked that the office had taken the position that the proposed boom should not be authorized without the consent of the Indians and reasonable payment for the privilege if demanded by them, but that however the office could see no objection to his hearing what the interested parties had to say.

The office is in receipt of a report from Agent Anderson, dated the 13th instant, in which he states that he met the Indians in council at DeSmet Mission on June 2d and . . . fully explained to them the contents of the aforesaid office letter; that after much discussion of the subject, a committee consisting of six chiefs and leading men of the tribe was designated to accompany him to the St. Joe River for the purpose of making a thorough examination of the premises desired to be used by the company in connection with the proposed booms and sorting works; that it was given full power to act for and on behalf of the tribe and to make such terms with the company as would seem to be fair and for the best interests of all concerned, and that said committee

accordingly met him on the 9th of June, at Harrison, Idaho, from whence they proceeded by steamboat to the point at the head of the lake where the company's sorting works have been established and thence up the St. Joe River and Chatcolet Lake along the lines of the booms, as indicated on the company's map.

Agent Anderson further states that after its deliberations the committee decided that on condition that the boom company would provide for a 200 foot opening in the boom line at a point below the draw bridge across St. Joe River where the Indians are maintaining and operating a ferry boat, and on the further condition that the company would pay an annual rent of $500, the same to be expended for the benefit of the Indians in such manner as would best promote their interests, there would be no objection, so far as the Indians are concerned, to granting the privilege asked for. These conditions, the agent says, were assented to by the representatives of the St. Joe Boom Company who accompanied the Indians and were present at their deliberations. A letter accepting these terms by the company its attached to Agent Anderson's report.

The latter reports further that while in the town of Harrison, which is a large saw mill center, situated near the proposed booms, he took occasion to interview the mill owners for the purpose of ascertaining their views respecting the application of the St. Joe Boom Company, but that he found only one firm, that of Kroetch Bros., who were opposing the company on grounds which from their own personal statements made to him seemed to be entirely of a personal nature and should not, therefore, be given consideration.

The agent says that all admitted that the proposed boom and sorting works were an absolute necessity and that they could not get along without the same; that the St. Joe Boom Company is financially able to conduct the enterprise and that

with the exception of one firm named all joined in recommending that the privilege asked for by that company should he granted.

In conclusion Agent Anderson states that after having thoroughly investigated and examined into the matter, as directed, he finds that the proposed booms and sorting works will in no way interfere with any of the Indians residing upon the Coeur d'Alene reservation, and that the compensation of $500 per annum which the company agrees to pay for the privilege asked is more than ample, considering the fact that no damage will be sustained by the Indians. The works, he says, are a public necessity and will materially aid the saw mill interests of that section of the country.

He accordingly recommends that the privilege to conduct and maintain booms and sorting works, as indicated by their map showing the location of such booms and sorting works, be granted to the said St. Joe Boom Company.

Accompanying Agent Anderson's report are letters by the William Howard Land and Lumber Company, the Coeur d'Alene Lumber Company, the St. Joe Lumber Company, the Harrison Box and Lumber Company, and Fred Grant, manufacturer of lumber, to the general effect that the proposed boom and sorting works at the mouth of St. Joe River are a necessary improvement and that the St. Joe Boom Company, being a responsible concern, should be granted the privilege of conducting and maintaining such boom.

Agent Anderson also forwards with his report 12 statements in the forms of affidavits, by the following named parties: E.S. Crane, contractor of Harrison; Warren Flint, lumberman, of Harrison; Fred Grant, lumberman, of Harrison; D.R. Cameron, lumberman, of Harrison; J.C. White, Civil Engineer, of Coeur d'Alene; Armand Perrenaud, a merchant of Coeur d'Alene; Edward T. Whitney, a contractor of Clarksia; Joseph Cole, a steamboat man, of St.

Maries; F.A. Shallis., a merchant of Coeur d'Alene; Joseph T. Scott, an Editor and Publisher, of Coeur d'Alene, David F. Mason, Postmaster at Coeur d'Alene, and Joseph I. Shallis, a steamboat man.

The aforesaid statements are of the general effect and set forth that the proposed log booms and sorting works, as shown by the map of the company, will not interfere with the free and uninterrupted use by the Indians, or anyone else, of the ferry at St. Joe crossing, the plans providing for a 200 foot opening which will also afford ample room for the operation of such ferry; that the proposed boom will not interfere at all with the use by the Indians of the pasture lands on the opposite side of the river as the crossing will always be available and as the boom will not extend above the draw bridge of the Oregon Railroad and Navigation Company's railroad, thus leaving the whole river above the bridge unobstructed; that the boom will not have a tendency to fill up the St. Joe River at its mouth, actual soundings showing that the river is 30 feet deep at that point which is a greater depth than at any point between there and the draw bridge where the piling ends; that as the stream is a rapid one the logs will float on the surface and not go to the bottom of the river as would be the case if the current were strong, and that there will not therefore be a tendency for the river to fill up; that the proposed boom and sorting works are a public necessity for the proper handling of the large amount of logs, poles, etc., which must be floated down the St. Joe River, and that the works will do no injury whatever to the Indians.

After giving careful consideration to this entire subject and in view of the report and recommendation made and submitted by Agent Anderson, the office is of the opinion that so far as the interests of the Indians and of the Indian Department are concerned there is no objection to the construction and maintenance of logging booms and sorting

works by the St. Joe Boom Company, as indicated in their map made and filed.

Inasmuch, however, as the proposed piling in connection with the works referred to is to be placed in a navigable lake and river the office is of the opinion that the matter is primarily and essentially one for the War Department to arrange for and supervise. However, it is suggested that the arrangements made with said company should require it to so operate and maintain the boomerage as not at any time to congest the river at its outlet and cause the same to overflow the adjacent Indian lands.

It would also seem to be proper that the company should be required to remove all piling and obstructions placed by them in said river and lake when the further use of the boom works is no longer required and their use is discontinued. To this end it is suggested that the company should be required to give a proper bond to insure the proper performance of its obligations and also to secure the annual payment agreed to be made to the Indians of the Coeur d'Alene reservation.

In connection with this subject the office has to state that on the 18th instant Hon. T.L. Glenn left in this office a communication addressed to the Department of the Interior, dated June 12, 1902, by the Empire Mill Company (without autograph signature), also statements by W.L. Stone, Victor Le Doux and George W. Pierce, such statements being in the nature of protests against the granting of the privilege of constructing and maintaining log booms, as indicated, to the St. Joe Boom Company.

The Empire Mill Company in its said letter sets forth that in March last Agent Anderson advised them that the Department had decided to leave the question of constructing logging booms to the Coeur d'Alene Indians to decide; that terms were accordingly made with the Indians whereby it was agreed to pay them $500 annually for the privilege, the

agreement to be subject to ratification by the Department; that said company was invited by representative Indians to meet them and Agent Anderson at DeSmet Mission on June 2d, and that Mr. Anderson then and there denied that the Indians had anything to do or say in the matter and conducted himself in a manner unbecoming an officer of the Department.

Said Empire Mill Company protests against the granting of the privilege proposed to the St. Joe Boom Company and invites an investigation.

In connection with this protest attention is invited to the statement contained in Agent Anderson's report to the effect that he found but one firm opposed to the granting of a boom privilege to the St. Joe Boom Company, viz., the firm of Kroetch Bros., and in this connection attention is invited to the fact that two of the statements above referred to, those of W.L. Stone and Victor Le Doux, are witnessed by L.I. Kroetch. It is therefore suggested that the Empire Mill Company and Kroetch Bros, referred to by Agent Anderson, are probably one and the same concern.

If so, it is submitted that so far as the protest against the granting of a boom privilege to the St. Joe Boom Company is concerned the report of Agent Anderson effectually disposes of the matter.

The sentiment in favor of the St. Joe Boom Company is apparently almost overwhelming.

Respecting the alleged conduct of Agent Anderson towards the representatives of said Empire Mill Company at the Indian council, the office has to say that said agent has been called upon for a statement.

Agent Anderson's aforesaid report, together with all the affidavits and papers accompanying the same, and the papers filed by Hon. T.L. Glenn, are transmitted, herewith, with the recommendation that they be submitted to the Secretary of

War for such further action upon the application of the St. Joe Boom Company as may be deemed proper.

It is suggested that the War Department be requested to advise this Department of its action in the premises.

There is no application of said St. Joe Boom Company or by any other person or company for the boom privilege under consideration, now on file in this office, the applications of said St. Joe Boom Company and of C.R. Smith, et al., having been returned to the Department by office report of March 7,1902.

Very respectfully,

Your obedient servant,

/s/ Illegible
Acting Commissioner.

(J.R.W.)

P.

APR 12 2001

No. 00-189

Supreme Court, U.S.
FILED
APR 12 2001
CLERK

In The

Supreme Court of the United States

STATE OF IDAHO,

Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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INTRODUCTION

Title to submerged lands is vested in each state "by the Constitution itself." *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977). Upon a state's admission, the state gains absolute title to submerged lands, and no power vested in Congress can defeat such title. *Id.* Congress cannot circumvent this constitutional limitation upon its powers by reserving to itself the authority to make dispositions of submerged lands after the date of statehood. It must, prior to statehood, either convey the submerged lands or reserve them in permanent federal ownership. *Utah Div. of State Lands v. United States*, 482 U.S. 193, 202 (1987). This Court, moreover, will "not infer an intent to defeat a State's equal footing entitlement from the mere act of reservation itself." *Id.*

These fundamental principles heretofore have been unchallenged. Respondents, however, now propose a third test for defeat of state title, drawn not from existing equal footing authority, but manufactured solely for the purpose of success presently. Under their new approach, and their interpretation of the record below, Congress temporarily defers the assumption of state title whenever Congress authorizes negotiations for a cession of reservation uplands, such negotiations are ongoing at the time of statehood, and, during the negotiations, the United States accedes to tribal demands for retention of submerged lands as consideration for the tribe's cession of uplands. U.S. Br. 32; Tribe Br. 16. The implicit assertion that Congress may defer temporarily a state's assumption of sovereignty over submerged lands for the purpose of retaining the ability to deprive the state of *some* of those lands after statehood is as implausible as it is unprecedented.[1]

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[1] The United States additionally asserts the equally implausible position that Congress defeated state title to the submerged lands in order "to negotiate with the Tribe for their

Beyond this core departure from accepted equal footing doctrine, Respondents suggest that it is not necessary that Congress specifically contemplate the effect of its action on the assumption of state sovereignty over submerged lands. *See* U.S. Br. 44-45. To adopt this suggestion would require the rejection of the principle that the United States must "establish that Congress affirmatively intended to defeat the future State's title" to submerged lands. *Utah Div. of State Lands*, 482 U.S. at 202. Such affirmative intent must take the form of a definite declaration or otherwise plain statement that "clearly express[es] an intention to defeat" a state's sovereign title to submerged lands. *Id.* at 208.[2]

Here, neither the 1889 Act nor the Act admitting Idaho into the Union clearly expressed an intent to defeat Idaho's title to submerged lands within the Coeur d'Alene Reservation. If anything, the opposite is true: Congress, despite its obvious concern over the inclusion of submerged lands in the Reservation, confined the subsequent negotiations to the purchase of timber and mineral lands. The clear implication is that it did not recognize tribal title to submerged lands. While Respondents struggle to construct an intent to recognize tribal title – and defeat state title – from surrounding circumstances, partial passages of the 1891 Act before statehood, and post-statehood actions, they ultimately fail to identify a single, clear expression of congressional purpose to

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release." U.S. Br. 28. Such an argument is inherently flawed, since without the *prior* defeat of state title, and the conveyance of submerged lands to the Tribe, there could be no negotiations with the Tribe for the release of submerged lands.

[2] Notably, in other areas where Congress has the authority to abrogate state sovereign rights, such as sovereign immunity, the Court has required that Congress must make its intention "unmistakably clear in the language of the statute." *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989). Where unmistakable statutory language is the standard, "recourse to legislative history will be futile." *Id.*

defeat state sovereign title to the submerged lands at issue.

ARGUMENT

A. At no time prior to the point of statehood did Congress express an affirmative intent to defeat state title to submerged lands within the Coeur d'Alene Reservation.

The arguments of the United States and the Tribe center primarily on the 1889 Act that authorized negotiations for a cession of a portion of the Coeur d'Alene Reservation, the negotiations that resulted, and the 1890 Act admitting Idaho into the Union. Each are addressed separately below.

1. The 1889 Act

The Respondents do not suggest that the 1889 Act conveyed any interest in submerged lands to the Tribe. Nor do they suggest that the 1889 Act was intended to set aside the lands within the 1873 boundaries as a permanent federal reservation. The Respondents are also unable to identify any specific language wherein Congress expressed an intent to defeat state title to any particular submerged lands. Finally, the Respondents admit that the 1889 Act omits any reference to the submerged lands that were supposedly the subject of the negotiations authorized by the Act.

To avoid the difficulties raised by the above facts, the Respondents suggest that Congress *necessarily* intended to reserve title to the submerged lands within the Coeur d'Alene Reservation for the time needed to negotiate with the Tribe to determine their ultimate disposition.[3]

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[3] The United States' argument rests in part on its assertion that this Court recognized, in *United States v. Alaska*, 521 U.S. 1 (1997), that § 6(e) of the Alaska Statehood Act was intended to

This proposition is based on two assertions: first, the Respondents assert that retention of submerged lands within the 1873 Reservation was "necessary to enable tribal members to continue their fishing and other uses of the lake and associated rivers and to preserve Congress's ability to bargain in good faith with the Tribe concerning possible cession of a portion of its Reservation." U.S. Br. 27; Tribe Br. 13. Second, the Respondents assert that by authorizing negotiations with the Tribe for a portion of "its reservation," Congress necessarily intended to recognize the Tribe's right to control the disposition of all lands within the Reservation, including submerged lands. U.S. Br. 26-27; Tribe Br. 13.[4]

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temporarily preserve the United States' prerogative to make a determination after statehood as to whether the United States would retain permanent ownership of submerged lands within the Arctic Wildlife Range. U.S. Br. 41-42. This is a significant alteration of the argument that the United States made to this Court in *Alaska*, where it asserted that § 6(e) was intended to maintain *permanent* federal ownership of all lands within the wildlife range, so that "[i]f the Secretary had ultimately denied the application, the United States would have continued to own those submerged lands – just as it had during the territorial period – unless and until Congress elected to *convey* them to Alaska." *United States v. Alaska*, No. 84, Original, Exception of the United States and Brief for the United States in Support of Exception at 46 (emphasis added).

[4] The United States also asserts that Congress, in enacting the 1889 Act, intended to "honor" the provision in the 1887 Agreement stating that "no part of the reservation shall ever be sold, occupied, open to white settlement, or otherwise disposed of without the consent of the Indians residing on said reservation," notwithstanding the fact that the act authorizing the 1887 negotiations expressly provided that "no agreement made shall take effect until ratified by Congress." Act of May 15, 1886, 24 Stat. 29, 44; App. 50. The quoted language was actually a standard provision in many treaties, and does not imply tribal ownership of submerged lands. The 1868 Treaty with the Crow Tribe provided that "[n]o treaty for the cession of any portion of

1. The assertion that Congress intended to retain the submerged lands within the 1873 Reservation for the purpose of providing for the Tribe's fishing needs is unsupported by the record. The only document the United States cites to support this proposition is an 1872 petition from the Tribe to the Commissioner of Indian Affairs. U.S. Br. 33, citing App. 27. There is no evidence in the record, however, that this document was ever forwarded to Congress. Congress's perception of the Tribe's needs, as of 1889, was instead shaped by the myriad documents provided to Congress in relation to the 1887 Agreement and the controversy that arose with regard to its inclusion of submerged lands within the Reservation. These documents include petitions from the Tribe, reports from commissions, letters from the Tribe's supporters, reports from the Commissioner of Indian Affairs, and transcripts of negotiations with the Tribe. Throughout these documents, however, there is not a single mention of fishing. App. 62-136, 162-358. In contrast, the Tribe's agricultural successes are prominently mentioned. App. 70, 75-76, 99, 126-27. Congress perceived the Tribe as farmers, a fact reflected in its mandate in the 1889 Act to protect the Tribe's agricultural lands.

2. In its deliberation of the 1889 Act, Congress was well aware of the fact that it held submerged lands "only in trust for the future State." *Weber v. Bd. of Harbor Comm'rs*, 85 U.S. (18 Wall.) 57, 65 (1873). Congress also knew that in order to defeat that trust, it would have to make its intent plainly known: this Court had previously declared that it would not infer a defeat of sovereign title

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the reservation . . . shall be of any force or validity . . . unless executed and signed by . . . a majority of all the adult male Indians occupying or interested in the same." Treaty with the Crow Indians, May 7, 1868, Art. 11, 15 Stat. 649, 652. Yet, in *Montana v. United States*, 450 U.S. 544 (1981), this Court never suggested that this language vested the Crow Tribe with property interests that would include ownership of navigable waters.

from ambiguous language. *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 416 (1842); *Montana v. United States*, 450 U.S. 544, 552 & n.2 (1981) (stating presumption against non-conveyance and the fact that "Congress was, of course, aware of this presumption once it was established by this Court").

Nonetheless, the United States asserts that Congress intended to defeat state title to submerged lands by authorizing negotiations with the Tribe for the purchase of "its reservation." In truth, however, the actual mandate to the federal commissioners was to negotiate with the Tribe for "the purchase and release by said tribe of *such portions* of its reservation not agricultural and *valuable chiefly for minerals and timber.*" App. 144 (emphasis added). On its face, the 1889 Act does not contemplate the purchase of submerged lands. Thus, retention of submerged lands was not necessary to the negotiations that Congress authorized. The fact that the authorization in the 1889 Act was limited to timber and mineral lands was reflected in the instructions given by the Commissioner of Indian Affairs to the commissioners who negotiated the 1889 Agreement:

> They make little if any use of the northern part of the reservation, for the simple reason that the best agricultural lands are in the extreme southern part of the reservation, and they are essentially an agricultural people. Hence the portion of the reservation they will be most likely to part with is the northern portion, the lands of which are believed to be chiefly valuable for minerals and timber, *classes to which the act only applies.*

Letter, Office of Indian Affairs to Gen. Benjamin Simpson, June 18, 1889, App. 148 (emphasis added). The Commissioner also emphasized that "the Act . . . *confines the negotiations* to the purchase of lands 'not agricultural and valuable chiefly for minerals and timber.' " App. 149 (emphasis added). Clearly, the Commissioner was interpreting Congress's intent, and he interpreted the 1889 Act

to apply only to timber and mineral lands. In contrast, the United States' assertion that Congress purported to negotiate with the Tribe for the release of submerged lands ignores the plain language of the 1889 Act.

The Tribe appears largely to agree with the State's interpretation of the 1889 Act. It asserts that the sole objectives of the 1889 Act were stated on the face of the Act, namely "to obtain mineral and timber lands." Tribe Br. 16, 32. It further asserts that "[t]here is *no* mention in the statute of any congressional desire to obtain the release of any portion of the Lake or any of the rivers." Tribe Br. 16.

The Tribe also admits that the official position of the United States at the start of the 1889 negotiations, as stated by General Simpson, was one of "common-interest status for the Lake." Tribe Br. 32.[5] In the Tribe's view, the intent to reserve submerged lands arose *during* the negotiations, when General Simpson "changed his approach immediately and dramatically," and agreed, in the Tribe's view, to tribal ownership of the lower part of the Lake. Tribe Br. 33. While the State disagrees that Simpson modified his initial position of common ownership, *infra*, there is no dispute that Simpson's original statement reflected the official position of the United States regarding the status of the submerged lands as of the opening of the 1889 negotiations. Thus, the United States' suggestion that Congress, in the 1889 Act, had defeated future state title to the Lake pending the outcome of the negotiations cannot be squared with the facts.

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[5] General Simpson's statement that the Lake belonged "to all, every one who wants to travel on it," App. 183, was a reiteration of the principle that navigable waters are held as "a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery." *Shively v. Bowlby*, 152 U.S. 1, 16 (1894). The Tribe agrees that General Simpson's proposal was "essentially along the lines of what would result if lake ownership were to pass to the state at statehood." Tribe Br. 14.

2. The 1889 Negotiations

While General Simpson's initial statement reflected the official federal position regarding ownership of submerged lands within the Reservation, the United States and the Tribe assert that Simpson changed his position during the negotiations and agreed to exclusive tribal ownership of a portion of the Lake. They further assert that this change in position was implicitly incorporated by Congress into its "understanding" of the sovereign rights Idaho would assume upon its admission into the Union. Aside from the problems inherent in any theory based on congressional "understanding" rather than congressional action, the Respondents' theory fails because it is wrong on the facts.

The Respondents assert the boundary across the middle of Coeur d'Alene Lake originated as a response to Chief Seltice's supposed "rejection" of the principle of public ownership. U.S. Brief at 10-11; Tribe Br. 14, 32. The transcript, however, shows that the boundary across the Lake was established, and shown to the Tribe, *before* Simpson explained the principle of public ownership:

> Saltise [sic]. Where will you make the lines?
>
> General Simpson. We fixed a line, as was shown you on the map; it is just as Mr. Liberty explained it to you. You understand that the lake belongs to you as well as to the whites – to all, every one who wants to travel on it.

App. 182-83. After being shown the boundary line on the map, Seltice responded: "That is your idea about the boundary. You know we do not understand papers; in taking it that way we will not know the boundaries." App. 183. Although the United States characterizes Seltise's remarks as a rejection of the principle of common ownership of the Lake, it is, when read in context, simply a request for clarification of the boundaries proposed by Simpson, based on the fact that Seltise was not used to dealing with maps.

Simpson then described the boundaries of the proposed cession, as previously shown on the map, by a narrative metes and bounds description. When finished, Simpson added that: "Now, if we buy this land you still have the St. Joseph River and the lower part of the lake and all the meadow and agricultural land along the St. Joseph River." App. 183. The only action intervening between Simpson's first statement, of common ownership of navigable waters, and his second statement, acknowledging that the Tribe would still "have" the St. Joseph River and the lower part of the Lake, was Seltise's interjection that he did not understand the map. There was not, as the Respondents suggest, any alteration in the commissioners' position, nor any alteration in the boundary across the Lake. Given these facts, the most natural reading of Simpson's second statement is that it was a reiteration of the first, i.e., that the Tribe would "have" the river and the lower part of the Lake upon the terms previously described, namely common ownership and use with non-Indians.

In a similar vein, the Respondents assign undue weight to the fact that the boundary of the 1889 cession crosses Coeur d'Alene Lake. U.S. Br. 15, 31; Tribe Br. 15-16. They ignore the fact that the mineral and timber lands being discussed for possible cession lay on both sides of Coeur d'Alene Lake, so that it was impossible to describe the cession, or the remaining reservation, in terms of a metes and bounds boundary that did not cross the Lake at some point. Logically, the commissioners chose to place this crossing by reference to an easily identifiable landmark, such as the mouth of the Coeur d'Alene River.

The Respondents also err in asserting that it was unusual for reservation boundaries to cross navigable waters. It was in fact commonplace. Both *Montana* and *United States v. Holt State Bank*, 270 U.S. 49 (1926), involved reservations where Congress had ratified, after statehood, cessions with boundaries that crossed lakes or

ran down the middle of navigable waterways. The cession of a portion of the Crow Reservation occurred in the same act that ratified the 1889 Agreement, and included all lands lying west and south of a described line that, in part, headed "in a due easterly course on a parallel of latitude to a point where it intersects the mid-channel of the Big Horn River, then following up the mid-channel of said river to a point where it crosses the Montana and Wyoming State line." Act of March 3, 1891, 26 Stat 989, 1040. In *Montana,* this Court never suggested that the post-statehood ratification of a boundary that ran along the middle of the Big Horn River was evidence that Congress recognized tribal title to the riverbed. The United States offers no reason to reach a different result here.

Holt State Bank addressed title to submerged lands within that portion of the Red Lake Reservation that was ceded by the Chippewa Indians pursuant to the Act of January 14, 1889, 25 Stat. 642. The cession included a boundary that cut straight across Red Lake.[6] An earlier cession included boundaries that went "down the main channel of [the] Thief River to its mouth on the Red River," and "up the main channel of the Red River to the

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[6] The negotiations authorized in the 1889 Act resulted in an agreement wherein the Red Lake Band of Chippewa Indians ceded certain lands and reserved the remainder. The northern boundary between the ceded and reserved lands "proceeded easterly to the most northwesterly point of the Upper Red Lake, thence easterly along the northerly shore of said Upper Red Lake to a point due north of a point 1 mile east from the easterly end of the Lower Red Lake, thence due south to the last-named point." H.R. Ex. Doc. No. 247, 51st Cong., 1st Sess. 28 (1890). The map of the reserved lands clearly shows it cutting across the middle of Upper Red Lake. *See* Charles C. Royce, *Indian Land Cessions in the United States,* reprinted in the 18th Annual Report of the Bureau of American Ethnology, H.R. Doc. No. 736, 56th Cong., 1st Sess. (1899). The map is found at plate 35, and the explanatory text at pages 934-35.

mouth of the Shayenne." Treaty of October 2, 1863, 13 Stat. 667. Yet, as in *Montana*, the Court never suggested that Congress's approval of such boundaries affirmed the Tribe's title to submerged lands within the original Red Lake Reservation.

The fact that neither *Montana* nor *Holt State Bank* mentioned boundaries that crossed the middle of navigable waters is not surprising, given the fact that the United States often set apart Indian reservations, both before and after statehood, with boundaries that crossed the middle of lakes or went down the middle of navigable rivers.[7] Reservation boundaries ran along or across navigable waters without any regard to the ownership of the underlying submerged lands.

3. 1890 Idaho Admission Act & Disclaimer Clause

The Idaho Constitution disclaims "all right and title . . . to all lands lying within such limits owned or held by any Indian or Indian tribes" and recognizes that

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[7] The Treaty with the Chippewa, Feb. 22, 1855, 10 Stat. 1165, established a reservation for the Pillager and Lake Winnibigoshish bands in the Territory of Minnesota. The boundary of the reservation went up the Little Boy River "to Lake Hassler, thence through the center of said lake to its western extremity, thence in a direct line to the most southern part of Leech Lake, and thence through said Lake, so as to include all the islands therein." 10 Stat. at 1166. The Executive Order of November 28, 1892, set apart a tract of land within the State of Washington for the use of the Yakima Indians. The tract's boundary ran "parallel to the general course of the [Wenatchee] river to the [Wenatchee] lake, then in a direct line across the lake to the place of beginning." 1 Charles J. Kappler, *Indian Affairs: Laws and Treaties* 926-28 (1904). The Executive Order of January 9, 1884, established a reservation for the Yuma Indians in the State of California. The boundary went "to the middle of the channel of the Colorado River, thence up said River, in the middle of the channel thereof. . . . " 1 Kappler 832.

"said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States." Idaho Const. Art. 21, § 19, App. 371. The United States argues that Congress, by accepting the disclaimer clause, "intended that all lands within the Tribe's established Reservation would remain in federal ownership for the Tribe's benefit at the time of statehood notwithstanding (or indeed, because of) Congress's failure to take final action on the 1889 Agreement." U.S. Br. 29. The Tribe takes a slightly different tack, arguing that the disclaimer clause has the "same operative effect as the provisions of § 11(b) [and § 6(e)] of the Alaska Statehood Act." Tribe Br. 44. These arguments confuse the difference between the generic disclaimer clause in the Idaho Constitution and the affirmative declarations of intent reviewed in *United States v. Alaska*, 521 U.S. 1 (1997), which explicitly modified federal/state relations relating to specific parcels of land that might otherwise have passed to the State of Alaska.

Disclaimer clauses have not played a role in this Court's equal footing cases.[8] Indeed, they could not, since the disclaimer of right and title to federal and Indian

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[8] This Court's recent submerged lands cases have all involved submerged lands within states with disclaimer clauses similar to that found in the Idaho Constitution. The Alaska Statehood Act, reviewed by this Court in *United States v. Alaska*, required the State of Alaska to disclaim "all right and title to any lands . . . the right or title to which is held by the United States or is subject to disposition by the United States. . . . " Pub. Law. 85-508, § 4, 72 Stat. 339 (1958). Yet, in *Alaska*, this Court never suggested that the disclaimer had any relevance to the question of whether Congress defeated state title to submerged lands within federal reservations. In *Montana*, this Court did not mention the Montana enabling act, which required the State to disclaim title to "all lands . . . owned or held by any Indian or Indian tribes." Act of February 22, 1889, § 4, 25 Stat. 676, 677. In *Utah Div. of State Lands*, there was no mention of the Utah Enabling Act, which required a disclaimer of title to

lands is "a disclaimer of proprietary rather than governmental interest." *Organized Village of Kake v. Egan*, 369 U.S. 60, 69 (1962). Because ownership of submerged lands is an incident of sovereignty, not a proprietary right, the disclaimer of proprietary interests in Indian lands has no bearing on a state's claims to submerged lands. *See Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 415-16 (1842) (holding that a transfer of sovereignty carries with it ownership of submerged lands, despite express retention of all proprietary rights); *United States v. Oregon*, 295 U.S. 1, 14 (1935) (upon the admission of a state, "the title of the United States to lands underlying navigable waters within the state passes to it, as incident to the transfer to the state of local sovereignty").

Disclaimer clauses do not alter the respective sovereignty of the federal and state governments: "powers of sovereignty . . . may not be constitutionally diminished, impaired, or shorn away by any conditions, compacts, or stipulations embraced in the act under which the new state came into the Union, *which would not be valid and effectual if the subject of congressional legislation after admission.*" *Coyle v. Smith*, 221 U.S. 559, 573 (1911) (emphasis added). Disclaimers exempting federal property from state authority "are but declaratory, and confer no new right or power upon the United States." *Van Brocklin v. Anderson*, 117 U.S. 151, 167 (1886). For these reasons, this Court has held that disclaimers addressing navigable waters simply enunciate rights Congress would otherwise possess under the Commerce Clause and other constitutional provisions, and do not alter the state's title to the underlying submerged lands. *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977); *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 229-30 (1845). Thus, even in cases confirming the declaration, in a disclaimer clause, of the exclusive right of the federal government to

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"unappropriated public lands." Act of July 16, 1894, § 3, 28 Stat. 107, 108.

control its lands, the Court has held simultaneously that "rights of local sovereignty, including the title . . . in the shores of navigable waters below high-water mark, vest in the state, and not in the United States." *Van Brocklin*, 117 U.S. at 168.[9]

Nor does the disclaimer banish state sovereignty over Indian reservations. This Court has held "that 'absolute' federal jurisdiction is not invariably exclusive jurisdiction." *Organized Village of Kake*, 369 U.S. at 68. It was early recognized that Indian reservations are "in many cases a part of the surrounding State or Territory, and subject to its jurisdiction except as forbidden by federal law." *Id.* at 72; *see also Draper v. United States*, 164 U.S. 240, 247 (1896) (holding that disclaimer did not prevent state sovereign authority over "crimes committed on a reservation or Indian lands by other than Indians or against Indians"); *Utah & N. Ry. Co. v. Fisher*, 116 U.S. 28, 31-32 (1885) (rejecting argument that Indian reservations were excluded from the limits of Idaho Territory and excepted from its jurisdiction).

Here, however, the United States attempts to rewrite the disclaimer clause by asserting that it applies to all lands that "Congress . . . *treated* as held by the Indians," and asserts that the disclaimer applied to "all lands within the Tribe's established Reservation." U.S. Br. 29 (emphasis added). The United States' argument ignores several key aspects of the disclaimer clause. First, by its plain terms, the clause does not disclaim title to all lands within the boundaries of Indian reservations, only those actually "owned or held" by the occupant tribe. This distinction was purposeful, since Congress knew that

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[9] The Tribe asserts that this Court reached a different result in *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962). The Tribe simply misreads *Metlakatla*. The Court never suggested that the disclaimer clause played any role in determining whether submerged lands within the tribe's reservation were tribal property.

many reservations contained non-Indian lands that were subject to state or territorial jurisdiction. *See, e.g., Utah & N. Ry. Co*, 116 U.S at 32 (upholding jurisdiction of Idaho Territory to impose taxes on railroad right-of-way through the Fort Hall Reservation). Second, the United States' argument fails to account for the fact that the disclaimer language was drafted in response to conditions created by the General Allotment Act, and was intended primarily to prevent the divestment of title to tribal allotments through the application of state laws. *Draper*, 164 U.S. at 246.

Perhaps most important, however, is the simple fact the disclaimer language does nothing to alter *federal* laws defining the ownership of lands within Indian reservations. And, under federal law, submerged lands within Indian reservations are held in trust for future states, unless Congress affirmatively defeated such title. *Montana*, 450 U.S. at 552; *Holt State Bank*, 270 U.S. at 55. Thus, if Congress failed, prior to the point of statehood, to take the steps necessary to defeat Idaho's sovereign ownership of the submerged lands within the Coeur d'Alene Reservation, the disclaimer clause does not prevent the State from assuming its rightful title to such lands. The disclaimer clause, in sum, does not operate *independently* to divest Idaho of a right it otherwise possesses by operation of federal law.

B. The secondary evidence cited by the United States and the Tribe does not constitute a plain declaration of affirmative congressional intent to defeat state title.

Because they cannot identify specific language in either the 1889 Act or the Idaho Admission Act that affirmatively defeats state title to submerged lands within the Coeur d'Alene Reservation, the Respondents direct the Court to several congressional actions, both pre- and post-statehood, which it asserts are "recognitions" of tribal title to the submerged lands at issue. Generally,

none of the cited acts is inconsistent with state title to submerged lands within the Coeur d'Alene Reservation, and none amounts to the definite declaration of intent that this Court has held is necessary to defeat state sovereign title to submerged lands.

1. The 1888 Railroad Act

In 1888, Congress granted a railroad company a right-of-way across the width of the Coeur d'Alene Reservation. A very small portion of the right-of-way passed over navigable waters. Act of May 30, 1888, 25 Stat. 160. The United States suggests that Congress's grant of the right-of-way required "the acquisition from the Tribe of submerged lands under Coeur d'Alene Lake." U.S. Br. 9-10. Congress, however, was free to grant rights-of-way over submerged lands regardless of whether it held title in trust for a future state. In fact, Congress often granted such rights after statehood, as an exercise of its authority to control commerce on the nation's waterways. *See, e.g.*, Act of October 12, 1888, 25 Stat. 552 (authorizing highway bridge over Lake Champlain in State of Vermont).

The Respondents assert, however, that Congress, by requiring compensation to the Tribe for the grant of the right-of-way, necessarily acknowledged tribal ownership of submerged lands. The Respondents ignore the fact that Congress did not explicitly direct compensation for the use of submerged lands, but instead left the fixing of compensation to the discretion of the Secretary of Interior. App. 138. Presumably, this left the Secretary with the ability to exclude compensation for the several hundred feet of the right-of-way that passed over submerged lands. Even if not, it would be unreasonable to base a defeat of state title on the fact that the United States fixed compensation by referring to the total length of the track, rather than excluding that miniscule portion that crossed over the St. Joe River. Such a windfall to the Tribe falls far short of the plain declaration of intent needed to divest a state of property that is "an inseparable attribute" of its

sovereignty. *United States v. Louisiana*, 363 U.S. 1, 16 (1960).

2. The 1891 Ratification Act

The Respondents insist that the Act of March 3, 1891, 26 Stat. 989, embodies the understanding that Congress retained ownership of submerged lands within the 1873 boundaries and conveyed a portion of them to the Tribe upon ratification of the 1887 and 1889 Agreements. In reality, however, the 1891 Act reveals a fatal flaw in the Respondents' argument that Congress retained ownership of all submerged lands within the 1873 boundaries. Section 22 of the 1891 Act provides that:

> *[A]ll* lands so sold and released to the United States, as recited or described in both of said agreements, and not heretofore granted or reserved from entry or location, shall, on the passage of this act, be restored to the public domain, and shall be disposed of by the United States to actual settlers only.

App. 386-87 (emphasis added). The Act plainly embodies the understanding that the lands "sold and released" by the Tribe consisted solely of uplands; otherwise, the plain language of the Act would open the submerged lands underlying Coeur d'Alene Lake to settlement. *See Utah Div. of State Lands*, 482 U.S. at 203-04 (proviso allowing opening of reserved lands to settlement implied that Congress did not intend to reserve submerged lands).

The Respondents attempt to counter this plain language with a reference to the Act's conveyance of "such portion of said reservation" as was included in an 1871 conveyance, by Chief Seltice to Frederick Post, of "all three of the river channels and islands" at Post Falls on the Spokane River. App. 387-88. The Respondents fail to note, however, that the actual language of the Act conveys to Post only "such portion of said reservation as is recited in the agreement" between Seltice and Post. App. 387. It was left to the General Land Office to determine

what portion of the lands in the agreement were included in the Reservation. The corresponding patent to Post includes both banks of the Spokane River, and the beds of *all three* river channels. App. 404-09. The 1873 Reservation, however, went only to the center of the channel of the Spokane River. Exec. Order of Nov. 8, 1873, App. 47-48. The portion of the River lying north of the Reservation boundary had never been reserved. Other than assuming an illegal grant, the only explanation for the patent to the river beds outside the 1873 boundary is that this particular part of the river, being a waterfall, was not understood to be navigable, so that ownership of both banks carried with it the ownership of the beds.[10] Regardless, this was a determination made by the General Land Office, not by Congress. The language chosen by Congress is neutral regarding the question of whether the riverbed was included in "such portion of said reservation as is recited in the agreement." App. 387.

3. Other Post-Statehood Evidence

The United States asserts that the Harrison cession of 1894, a portion of which includes boundaries over Coeur d'Alene Lake, confirms that Congress retained ownership of submerged lands. U.S. Br. 39-40. As noted earlier, however, it was not unusual for the United States to define post-statehood cessions using boundaries crossing over navigable waters. *Supra*, footnote 7. Further, Congress exercised no rights of ownership over the submerged lands at issue; it simply modified the Reservation boundary as it passed over the waters. A modification of reservation boundaries across navigable waters is not

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[10] The State does not assert that the Spokane River is non-navigable in fact, only that at this particular point in history, the General Land Office may have concluded that this particular portion of the river was non-navigable and thus the proper subject of a patent to Post.

inconsistent with state ownership of the underlying submerged lands.[11]

The remainder of the post-statehood evidence cited by the United States and the Tribe consists of evidence that was stricken from the record. The United States asserts that the survey of the lands conveyed from the United States to the State of Idaho for designation as Heyburn State Park included submerged lands. U.S. Br. 40. The assertion that the survey of the conveyance included submerged lands is a disputed fact that was not resolved by the trial court, because it ruled that "with the exception of evidence relating to the Harrison cession of 1894, it would not consider post-statehood evidence." Order of July 9, 1998, Docket No. 131.[12]

Likewise, the Tribe improperly cites a singular document, Exhibit No. 2254, that was stricken from the record. Order of July 9, 1998, Docket No. 131 (striking Exhibit No. 2254). The Tribe asserts, without foundation, that the document demonstrates that the Department of Interior had concluded that the Tribe "owned" the beds of navigable waters, since it required payment from a company seeking to build log booms in the St. Joe River. Tribe Br. 21. Such an assertion ignores the fact that riparian land

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[11] It should be noted that in its initial authorization of the Harrison Cession, Congress specified that the western boundary of the cession should follow the shore of Coeur d'Alene Lake. Act of July 13, 1892, 27 Stat. 120, 124.

[12] Although the United States cites an expert report for the proposition that "the survey of the withdrawal included acreage of submerged lands," U.S. Br. 40, the quoted expert report states only that the "official government appraisals valued swamp and overflow lands." 2 E. Richard Hart, Expert Report 278 (Rec., Ex. 1439). Swamp and overflow lands are not submerged lands, but consist of marshes, intermittent ponds, and the lower levels of stream flood plains. Bureau of Land Management Technical Bulletin 6, *Manual of Instructions for the Survey of the Public Lands of the United States* 179 (1973). Such lands are not meandered in surveys, as are navigable waters. *Id.*

owners along navigable waters have a right of ingress and egress to and from those waters. *Shephard v. Coeur d'Alene Lumber Co.*, 101 P. 591 (1909). The "right of ingress and egress . . . is a property right . . . that must be respected." *Id.* at 593. For example, the Idaho Supreme Court has held that the construction of log storage facilities along the shores of navigable waters converts the right of public use into a private use and violates "the upland owner's property rights." *Id.* Thus, the requirement of payment to the Tribe for the construction of a log boom adjacent to its lands did not imply ownership of the bed itself, but was rather compensation for interference with the Tribe's then-existing riparian rights of access. Such rights, of course, ceased when the Reservation was allotted and all lands along the Coeur d'Alene Lake and the St. Joe River were sold in fee to non-Indians. 2 Hart Expert Report 274 (describing allotment and cessation of tribal title to riparian lands).

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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In The

Supreme Court of the United States

STATE OF IDAHO,

Petitioner,

v.

UNITED STATES OF AMERICA
and COEUR D'ALENE TRIBE,

Respondents.

On A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF ON THE MERITS OF BENEWAH COUNTY AND KOOTENAI COUNTY OF IDAHO IN SUPPORT OF STATE OF IDAHO, PETITIONER

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QUESTIONS PRESENTED

Prior to the admission of the State of Idaho on an equal footing with the original states by Act of July 3, 1890 [26 Stat. 215], did Congress act with the intent to defeat state title to submerged lands below navigable Lake Coeur d'Alene? Did Congress authorize the president or other executive officers to defeat state title to such submerged lands prior to Idaho statehood?[1]

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[1] The Questions Presented is a restatement pursuant to Rule 24.1(a) of the Question Presented stated by the State of Idaho in its Brief on the Merits.

LIST OF ALL PARTIES

A. Parties to the Proceeding Below.

The Writ of Certiorari is to the decision of the 9th Circuit Court of Appeals. The parties before the 9th Circuit were the State of Idaho, the United States of America and the Coeur d'Alene Tribe of Idaho and are the same parties that appear before this Court.

B. Amici Counties.

This Amicus Curiae Brief is submitted by Benewah County and Kootenai County in the State of Idaho pursuant to Rule 37.4. The navigable waters at issue are located in the Amici Counties.

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DECISION BELOW

The writ of certiorari is to the United States Court of Appeals for the Ninth Circuit. The decision of the Ninth Circuit Court of Appeals is set forth in *United States v. Idaho*, 210 F.3d 1067 (9th Cir. 2000) and is further set forth in the Petition Appendix pgs. 1-30. The Ninth Circuit Court of Appeals affirmed the decision of the United States District Court, in *United States v. Idaho*, which is reported at 95 F. Supp.2d 1094 (Idaho 1998), which is also set forth at Petition Appendix pgs. 31-86. The Ninth Circuit Court of Appeals and the District Court held that the United States and the Coeur d'Alene Tribe have fee simple absolute title to the submerged lands of Coeur d'Alene Lake and the St. Joe River.

JURISDICTIONAL STATEMENT

The Court of Appeals entered its judgment on May 2, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article I, Section 8.

"The Congress shall have the power . . . [Clause 3] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . . "

United States Constitution, Article IV, Section 3.

[Clause 1] "New States may be admitted by the Congress into this Union. . . . "

[Clause 2] "The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any claims of the United States, or of any particular State."

United States Constitution, Article IV, Section 4.

> "The United States shall guarantee to every State in this Union a Republican Form of Government. . . . "

United States Constitution, Amendment X.

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Idaho Admission Act, 26 Stat. 215, Section 1.

"The State of Idaho is hereby declared to be a State of the United States of America, and is hereby declared admitted into the Union on an equal footing with the original states in all respects whatever; and that the Constitution which the people of Idaho have formed for themselves be, and the same is hereby, accepted, ratified, and confirmed."

STATEMENT OF THE CASE

These Amici Counties concur generally with the Statement of the Case provided by the State of Idaho.

These Amici Counties provide additional support in the text of the argument hereafter based upon public reports and records as they appeared before Congress.

SUMMARY OF THE ARGUMENT

In 1890, Idaho was admitted into the Union on an equal footing with the original states. In 1994, the United States brought an action to quiet title to a portion of the beds and banks of the navigable waters of Coeur d'Alene Lake and the St. Joe River lying within the exterior boundaries of the Coeur d'Alene Indian Reservation established by an 1891 Act of Congress. The Coeur d'Alene Tribe was an intervenor in the District Court. *United States v. Idaho*, 210 F.3d 1067 (9th Cir. 2000) (Petition App. pp. 1-30).

States have a special sovereign status under the scheme of government in the United States Constitution. Generally, the beds and banks of navigable waters become part of the sovereign rights acquired by a state through the operation of the Constitution of the United States when a state is admitted on an equal footing with the original states. *Utah Division of State Lands v. United States*, 482 U.S. 193, 195-197 (1987); *Montana v. United States*, 450 U.S. 544, 551 (1981); *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 373-74 (1977). There is a strong presumption against defeating Idaho's title to submerged lands. *See Montana*, 450 U.S. at 552.

The Executive Order in 1873, the agreements between the Tribe and the United States negotiated in 1887 and

1889, the admission of the State of Idaho by Congress on an equal footing in 1890, and the 1891 ratification of the 1887 and 1889 agreements by Congress should be considered in the context of the Congressional and government policies at the time. Congress has the exclusive power to dispose of territory and property belonging to the United States. *Sioux Tribe of Indians v. United States*, 316 U.S. 317, 324-25 (1942). Prior to the admission of Idaho as a state of the Union on an equal footing with the original states in 1890, the policy of Congress and the executive department was to diminish tribal relations and tribal control and to facilitate individual Indians to become self-sufficient and depend on agriculture for their subsistence. The general policy was for the "assimilation" and "civilization" of individual members of the Tribe.

The State of Idaho was admitted on an equal footing with the original states. Idaho Admission Bill, Act of July 3, 1890, 26 Stat. 215. The rule of law established by this Court when Idaho was admitted was that: (1) submerged lands under navigable waters were held in trust for future states while the lands were part of a territory; and (2) new states were to be admitted on an equal footing and were to have the same rights as the original states in submerged lands below navigable waters. *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 230 (1844); *Shively v. Bowlby*, 152 U.S. 1, 26 (1894). The enactments of Congress and the decisions of this Court which are contemporaneous with the negotiation of agreements with the Coeur d'Alene Tribe support the conclusion that Congress did not intend to recognize tribal ownership of the beds of the navigable waters of Lake Coeur d'Alene and the St. Joe River prior to Idaho statehood in 1890. The conclusion of the Ninth

Circuit Court of Appeals upholding tribal ownership of navigable waters is inconsistent with the actions of Congress and the decisions of this Court between 1842-1891.

The public's right of access and use of navigable waters is part of the "Public Trust Doctrine". Since the earliest days of the existency of the United States of America, Congress has jealously guarded navigable waters to assure the public's right to access and use of such waters. The concept of the Public Trust Doctrine was first explained in *Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 367, 414 (1842). The Public Trust Doctrine was further described in *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 435, 452 (1892) and establishes the rights of the public in navigable waters.

The Coeur d'Alene Tribe has claimed that it has the power to exclude or prohibit any use of Lake Coeur d'Alene by non-Tribal of the navigable waters owned by the Tribe. Amicus Curiae Brief in Support of Petitioner, Appendix at pp. 2 and 5. It is clear that the State of Idaho could not exclude or prohibit the use of such navigable waters by the public. *Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1093-94 (Idaho 1983). There is no body of law which assures the use of navigable waters by the non-tribal members of the public, including non-members of the Tribe, if such waters are owned by the United States for the Coeur d'Alene Tribe. State ownership is necessary to preserve the public's right to access and to use Lake Coeur d'Alene.

ARGUMENT

A. Amici Counties.

This Amicus Curiae Brief is submitted pursuant to Rule 37.4. These amici are Benewah County and Kootenai County in the State of Idaho. The navigable waters at issue are located within the Amici Counties. The navigable waters are claimed by the United States and the Coeur d'Alene Tribe. The residents of the Amici Counties have used and enjoyed these navigable waters for more than 100 years.

The Amici Counties and the public located in Amici Counties are being affected by the decision of the Ninth Circuit Court of Appeals, and will be affected by the decision of this Court. The decision of the Ninth Circuit Court of Appeals in *United States v. Idaho*, 210 F.3d 1067 (9th Cir. 2000) not only ousts the State of Idaho from exercising jurisdiction and authority over the navigable waters within the Coeur d'Alene Indian Reservation, but ousts the Amici Counties from exercising any jurisdiction or authority over activities on such navigable waters. In addition, the Tribe claims that it has the absolute and exclusive authority over the navigable waters, including the power and authority to exclude or prohibit any use of such waters by non-members. The purpose of this Amicus Curiae Brief is to emphasize the far reaching implications of the decision of the Ninth Circuit Court of Appeals and to provide further support for ownership of submerged lands underlying navigable Lake Coeur d'Alene by the State of Idaho.

B. States Have Special Status Under the Constitution.

United States Constitution, Article I, Section 2, provides that each *State* shall have a representative in the House of Representatives. United States Constitution, Article I, Section 3, provides that each *State* shall have two Senators. United States Constitution, Article I, Section 8, Clause 3 provides that Congress shall have the power to "regulate commerce . . . among the several *States*, and with the Indian tribes. . . . " United States Constitution, Article III, Section 2, paragraph 1 provides that the judicial power of the United States extends to controversies between two or more *States*. United States Constitution Article IV, Section 1 provides that full faith and credit is to be given in each *State* to the records and acts of every other State. Article IV, Section 3 provides that new States may be admitted by the Congress into the Union and further protects the integrity of each State. United States Constitution, Article IV, Section 4 provides that the United States shall guarantee to every State a "republican form of government. . . . " United States Constitution, Amendment X provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the *States, are reserved to the States* respectively, or to the people". . . . United States Constitution, Amendment XI provides that the judicial power of the United States does not extend to suits brought against a *State* by citizens of another State. Amendment XI required the dismissal of the suit of the Coeur d'Alene Tribe of Idaho against the State of Idaho where the Tribe claimed title to the submerged navigable waters of Lake Coeur d'Alene, a portion of which are the same navigable

waters that are at issue in this case. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997).

At an early date, Chief Justice Marshall described the distinctions between a State and an Indian tribe. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). Justice Marshall concluded that tribes are "not a State of the Union. . . . " *Id.* at 16. Indian tribes "may, more correctly, perhaps, be denominated domestic dependant nations." *Id.* at 17. This Court concluded that the framers of the United States Constitution "had not the Indian Tribes in view when they opened the courts of the Union to controversies between a State or the citizens thereof, and foreign states." *Id.* at 18. Chief Justice Marshall reached the following conclusion:

> The Court has bestowed its best attention on this question, and, after mature deliberation, the majority is of the opinion that an Indian tribe or nation within the United States is not a foreign state in the sense of the Constitution and cannot maintain an action in the courts of the United States.

Id. at 20. Justice Marshall did note the plenary power of Congress found in the United States Constitution, Article I, Section 8, Clause 3, which authorizes Congress to regulate commerce with Indian tribes. *Id.* at 18.[2] Nowhere in

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[2] *See also Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) (holding that the U.S. Supreme Court may review a decision of a state court to determine if state law is superceded by the U.S. Constitution, laws enacted under the Constitution, or treaties of the United States.). *Worcester* dealt with the application of Georgia's penal code on lands held by the Cherokee Nation pursuant to a treaty with the U.S.

the Constitution, nor in any case law laid down by this Court, is there support for a conclusion that an Indian tribe should be treated the same as States when determining title to submerged lands. Furthermore, as discussed *infra* at H., the public trust doctrine applicable to States with regard to navigable waters has never been applied to Indian tribes.

The status of States, (new States and original States), and the Union of States is discussed in *Coyle v. Smith*, 221 U.S. 559 (1911). Although it may be argued that much of the dissertation in *Coyle* is dicta, the discussion is, nonetheless, instructive. In concluding that the State of Oklahoma was empowered with the same attributes of sovereignty as the original states in connection with the moving of Oklahoma's capital, the Court also discussed this Court's prior decisions dealing with the status of States, particularly decisions relating to title to navigable waters in the original states and new states and the sovereign rights of the states under the Constitution and the equal footing doctrine first laid down by this Court in *Pollard v. Hagen*, 44 U.S. (3 How.) 212 (1845). *Coyle*, 221 U.S. at 70. The title of States in connection with navigable waters has, on only two occasions, been deemed to have been defeated. *See Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), *and United States v. Alaska*, 521 U.S. 1 (1997) (discussed *infra* at D).

C. State Sovereignty Over Submerged Lands under the United States Constitution.

The Constitution of the United States ratified in 1789 provides in Article I, Section 8, Clause 3 that "Congress shall have power to regulate commerce with foreign nations and among the several states, and with the Indian Tribes." This Court concluded that the power of Congress under the foregoing provision includes the power of Congress to regulate navigation within the limits of every State. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197 (1824). In *Gibbons v. Ogden*, this Court recognized that the authority of Congress over navigation may not be exclusive. *Id.* at 197-98.

In *Gibbons v. Ogden*, this Court discussed the respective authorities of states and Congress over commerce and navigation. *Id.* at 197-221. In its discussion, the Court took note of the argument that states retain sovereignty over commerce and navigation based upon the 10th Amendment reserving all of the powers to the states that had not been granted to the Federal Government. *Id.* at 198. The Court further took notice of the provisions in the United States Constitution providing that the Constitution and all laws enacted pursuant to the United States Constitution are the supreme law of the land.[3] However, the discussion of Chief Justice Marshall of this Court in *Gibbons v. Ogden* can be distilled to one overriding principle. That principle is that when Congress has exercised the authority expressly granted to it by the Constitution

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[3] *Id.* at 210-211 (apparently referring to United States Constitution, Article VI, Clause 2).

for the regulation of commerce, including navigation (*i.e.*, the licensing of ships), a state is prohibited from enacting or enforcing a statute which is inconsistent with or in conflict with Congress' statute. *Id.* at 211-218. This Court left open the authority of a state over navigable waters where Congress had not exercised its authority under the United States Constitution.

Generally a state has authority over navigable waters in the state absent an act of Congress on the subject matter. *Wilson v. The Blackbird Creek Marsh Company*, 27 U.S. 245, 252 (1829). Absent a regulation enacted by Congress, a state has authority to authorize the construction of bridges over navigable waters. *Id.* The authority of states over navigable waters was recognized by this Court on many occasions throughout the 19th Century.[4]

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[4] *See Huse v. Glover*, 119 U.S. 543, 549-550 (1886) (Illinois may authorize a dam on a navigable river and the owner may charge a reasonable nondiscriminatory fee to use the locks thereof); *Cardwell v. American River Bridge Company*, 113 U.S. 205, 208-209 (1884) (a bridge authorized by a state which restricts navigation on navigable water is not prohibited by the United States Constitution or other laws unless Congress has acted to prohibit such obstruction); *Miller v. Mayor of New York*, 109 U.S. 385, 397 (1883) (Brooklyn Bridge was duly authorized by both the State of New York and Congress); *Escanaba and Lake Michigan Transportation Company v. City of Chicago*, 107 U.S. 678, 683-84 (1882) (Illinois has full power to regulate bridges over navigable waters until Congress acts on the subject; *Pound v. Turck*, 95 U.S. 459, 462-64 (1878) (Wisconsin may authorize dams on navigable waters until prohibited by Congress); *Gilman v. City of Philadelphia*, 70 U.S. (3 Wall.) 713, 727-732 (1866) (a bridge authorized by the State of Pennsylvania is lawful since Congress had not exercised its authority to restrict such bridge); *Pennsylvania v. The Wheeling and Belmont Bridge Company*, 54 U.S.

The only exception to state authority over navigable waters is where the authority was surrendered to the general Government under the Constitution of the United States. *Martin*, 41 U.S. at 410. The Original States became sovereign and took title to the beds of navigable waters in trust for the public. *Id.* New states took title to the beds of navigable waters on an equal footing with the original states. *Pollard*, 44 U.S. at 229-230. In 1876, this Court acknowledged that the inland states, by reason of their "inherent sovereignty," have title to the beds and shores of navigable rivers and lakes. *Barney v. City of Keokuk*, 94 U.S. 324, 338 (1876). The sovereignty of states over submerged lands and navigable waters has always been preeminent except to the extent that such sovereignty has been surrendered to the general Government pursuant to the United States Constitution and where Congress has acted.

D. Standard for Defeating State Title to Submerged Lands.

This Court has recognized that "the ownership of land under navigable waters is an incident of sovereignty." *Montana*, 450 U.S. at 551. Control over property underlying navigable waters is strongly identified with the sovereign power of government. *Id.* at 552; *see also United States v. Oregon*, 295 U.S. 1, 14 (1935). At issue in

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(13 How.) 518, 565-578 (1851) (a bridge authorized by Virginia over a navigable river which blocked navigation of goods to and from Pennsylvania was prohibited by an act of Congress, which approved a compact between Virginia and Kentucky assuring free navigation on the navigable river); *Wilson*, 27 U.S. at 252.

this case is whether the State of Idaho or the United States and the Coeur d'Alene Tribe have the rights and powers over the navigable water at issue herein. This Court has previously recognized Idaho's ownership of the beds of navigable waters in Idaho under the equal footing doctrine. *Scott v. Lattig*, 227 U.S. 229, 243 (1913). In fact, this court has previously acknowledged that Idaho claims that it owns Lake Coeur d'Alene. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 282 (1997).

This court has always recognized several governing principles which apply to state claims to the ownership of submerged lands under navigable waters. The ownership of submerged lands is an essential attribute of sovereignty for states. *Id.* at 282-83; *United States v. Alaska*, 521 U.S. 1, 5 (1997); *Utah Division of State Lands*, 482 U.S. at 195-198; *Montana*, 450 U.S. at 551-552; *Oregon*, 295 U.S. at 14; *United States v. Holt State Bank*, 270 U.S. 49, 53-54 (1926); *Shively*, 15 U.S. at 43-44; *Pollard*, 44 U.S. at 228-29; *Martin*, 41 U.S. at 410.

A party challenging a state's title to submerged lands has a heavy burden to bear.

> [A] court deciding a question of title to the bed of a navigable water must, therefore, begin with a strong presumption against conveyance by the United States . . . and must not infer such a conveyance "unless the intention was definitely declared or otherwise made plain" . . . or was rendered "in clear and special words" . . . or "unless the claim confirmed in terms embraces the land under the waters of the stream". . . . (Citations omitted.)

Montana, 450 U.S. at 552. This court further stated that "Congress was, of course, aware of this presumption once it was established by this Court." *Id.* at note 2.

The principle that the original states acquired title to the beds of navigable waters within the boundaries of the state was established in 1842 in *Martin v. Lessee of Waddell, supra*. The principle that new states are admitted on an equal footing with the original states and that the United States holds title to the beds of navigable waters within territories in trust for future states was established in *Pollard v. Hagen, supra*. Clearly, it must be presumed that Congress knew that the beds of navigable waters in the Territory of Idaho were held by the United States in trust for the future state prior to the admission of Idaho in 1890. Congress knew that there would be a strong presumption against any conveyance to anyone, including the Coeur d'Alene Tribe. Congress also knew that if Congress intended for such conveyance to be effective, Congress would be required to authorize such conveyance in clear and special words with the intention of Congress being definitely declared or otherwise made plain.

As previously noted, this Court has only held that a state's title to the beds of inland navigable waters was defeated in two cases. *See Alaska*, 521 U.S. at 45-46, *and Choctaw Nation*, 397 U.S. at 631. Each case had its peculiar circumstances. *Choctaw Nation* dealt with treaties between the United States and the Choctaw Nation. The treaties provided for the conveyance of fee simple title in the land in the reservation to the Tribe, and a pledge by the United States that " '[n]o Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation- . . . and that no part of the land granted to them shall ever

be embraced in any Territory or State.' " *Choctaw Nation*, 397 U.S. at 625. Under the circumstances of *Choctaw Nation*, it cannot be argued that the United States held title to the beds of the navigable waters in the territory in trust for a future state, since the United States had made a solemn promise that there would be no future state. Thus, the equal footing doctrine would not apply to the lands within the territory granted to the Choctaw Nation. In addition, the commitments made by the United States to the Choctaw Nation were made prior to statehood and were made by treaties under the status of the law as it existed at that time – 1830s.

United States v. Alaska is the other case where this Court determined that state title to inland navigable waters was defeated. In *Alaska*, Congress had expressed its intent to defeat Alaska's title to submerged lands underlying a petroleum reserve and a wildlife refuge in Alaska's admission act. *Alaska*, 521 U.S. at 41-42. In the analysis, this Court determined: that Congress had authorized the President to reserve lands for a specific purpose; that the lands that were reserved by the President included the submerged lands; and that Congress intended to defeat state title when Alaska was admitted. *Id.* at 41-46.

As shown by the two exceptions (*Choctaw* and *Alaska*), this Court has placed a very high hurdle for anyone to succeed in a claim to defeat the title of a state to submerged lands. As explained in *Montana v. United States*, submerged lands are strongly identified with the sovereign power of a state, are presumed to have been conveyed to the states on admission, are deemed to have been conveyed only if the intention is definitely declared

or otherwise made plain in clear and special words. *Montana*, 450 U.S. at 552. As will be shown hereafter, the events surrounding issuance of the Executive Order creating the Coeur d'Alene Indian Reservation in 1873 and the ratification of the agreements negotiated with the Coeur d'Alene Tribe by Congress in 1891 show that Congress did not express its intent to convey or reserve the submerged lands of Coeur d'Alene Lake for the Coeur d'Alene Tribe at any time prior to, or after, statehood.

E. The Established Government Policy and Law when Idaho was Admitted in 1890 Does Not Support United States and Tribal Ownership of Lake Coeur d'Alene.

In 1871, the Congress prohibited any new treaties with Indian Tribes. Act of March 3, 1871, 16 Stat. 566 (codified at 25 U.S.C. § 71 (1983)). No treaty was ever entered into between the United States and the Coeur d'Alene Tribe prior to 1871. After 1871, Congress had the exclusive authority to dispose of public lands or lands within territories. *See* U.S. Const. art. IV, § 3, cl. 2; *Sioux Tribe of Indians*, 316 U.S. at 326. Thus, to defeat Idaho's title, there must have been some action by Congress where the intent of Congress to defeat state title was clearly expressed in special words. By the 1870s, the general policy of Congress was to reduce the role of tribal governments and increase the independence and assimilation of individual tribal members. From 1855 to 1919, hundreds of reservations for Indian occupancy and other purposes were created by executive order. *Sioux Tribe of Indians*, 316 U.S. at 325. Congress had acquiesced in the establishment of Indian reservations by executive order.

Id. However, Congress never viewed an Indian reservation established by executive order as conferring title to land to an Indian Tribe without express authority provided by Congress. *Id.* at 325-330. After the withdrawal of authority for the President to contract with Indian Tribes by treaty by Congress in 1871, Indian reservations could only be established by the enactment of a statute by Congress, or with an executive order authorizing use and occupancy of land without title to the land. *Id.* at 324-330.

The general policy of the Government from 1871 until after the admission of the State of Idaho in 1890 and the ratification of the agreements with the Coeur d'Alene Tribe in 1891 was to "assimilate" or to "civilize" the members of all of the Indian Tribes and to dissolve the relationship between individual members of a tribe and the tribal organization. The policy of the Government toward tribes and their members is illustrated in numerous reports to Congress. After Congress prohibited any new treaties with tribes, the Secretary of the Interior reported that the Government claimed the right to control the soil which the Indians occupied and assumed the right to coerce the tribes to adopt the habits and customs of the non-Indian people of the United States, including the establishment of tribal members on farms. Report of the Secretary of the Interior, H.R. Exec. Doc. No. 1, 43d Cong., 3d Sess. 3-4, 7 (1872). In 1873, at the same time the President set aside lands for the Coeur d'Alene Tribe, the President submitted the report of the Secretary of the Interior to Congress discussing the policy concerning the division of Indian reservation lands and the pursuit of a policy of teaching tribal members to engage in farming

activities.[5] The policy of encouraging agricultural pursuits by individual tribal members continued in 1874.[6] Throughout the remainder of the 1870s, and at least until the Government policy continued to provide lands to individual tribal members and teach the members how to farm and provide for themselves in fixed homes on individual parcels of land.[7]

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[5] 5 H.R. Exec. Doc. No. 1, Part 5 Report of the Secretary of the Interior, 43d Cong., 1st Sess. (1873) at pp. III-IV.

[6] 6 H.R. Exec. Doc. No. 1, Part 5 Report of the Secretary of the Interior, 34th Cong., 2d Sess. (1874) at pp. III-IV.

[7] *See* H.R. Exec. Doc. No. 1, Part 5 Report of the Secretary of the Interior, 44th Cong., 1st Sess. (1875) at pgs. IV and IX; H.R. Exec. Doc. No. 1, Part 5 Report of the Secretary of the Interior, 44th Cong., 2d Sess. (1876) at pg. VII; House Executive Document No. 1, Part 5 Report of the Secretary of the Interior, 45th Cong., 3d Sess. (1878) pgs. III-V; H.R. Exec. Doc. No. 1, Part 5 Report of the Secretary of the Interior, 46th Cong., 2d Sess. (1879) at pgs. 5-7; *see also* H.R. Exec. Doc. No. 1, Part 5 Report of the Secretary of the Interior, 46th Cong., 3d Sess. (1880) at page 4; H.R. Exec. Doc. No. 1, Part 5 Report of the Secretary of the Interior, 47th Cong., 1st Sess. (1881) at page III; H.R. Exec. Doc. No. 1, Part 5 Report of the Secretary of the Interior, 47th Cong., 2d Sess. (1882) at pgs. VII-VIII; H.R. Exec. Doc. No. 1, Part 5 Report of the Secretary of the Interior, 49th Cong., 1st Sess. (1885) at pgs. 26-27; H.R. Exec. Doc. No. 1, Part 5 Report of the Secretary of the Interior, 49th Cong., 2d Sess. (1886) at page 4; H.R. Exec. Doc. No. 1, Part 5 Report of the Secretary of the Interior, 50th Cong., 1st Sess. (1887) at pgs. 24-28; H.R. Exec. Doc. No. 1, Part 5 Report of the Secretary of the Interior, 52d Cong., 1st Sess. (1891); H.R. Exec. Doc. No. 1, Part 5 Report of the Secretary of the Interior, 50th Cong., 2d Sess. (1888) p. XXIX; H.R. Exec. Doc. No. 1, Part 5 Report of the Secretary of the Interior, 51st Cong., 1st Sess. (1890) (containing the Secretary's Report for 1889); H.R. Exec. Doc. No. 1, Part 5 Report of the Secretary of the Interior, 51st Cong., 2d Sess. (1890), at pgs. XXIII-XXIV.

In 1887, Congress enacted the General Allotment Act. Act of February 8, 1887 (24 Stat. 388, *et seq.*) (codified at U.S.C. § 331, *et seq.* (1983)). The policy of the General Allotment Act was "to end the tribal and nomadic life of the Indians by allotting a portion of reservation lands in severalty to each Indian residing on a reservation, and selling off the excess lands The Indians were to be established as individual settlers on separate allotments of land gaining a livelihood by pastoral pursuits." *Hopkins v. United States*, 414 F.2d 464, 467 (9th Cir. 1969). In *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 650, note 1 (1976), this Court noted the object of the General Allotment Act of 1887 was to end tribal land ownership and to provide for private ownership by individual Indians with the expectation of assimilation of individual Indians as members of society and to relieve the Federal Government of the need to supervise Indian affairs.[8]

On November 1, 1873, the Commissioner of Indian Affairs made a report to the Secretary of the Interior for

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[8] For a discussion of the General Allotment (Dawes) Act of 1887, *see Cohen's Handbook of Federal Indian Law*, 1982 Ed., pp. 130-132. For further discussions of Federal policies regarding the status of tribes and individual members in the late 1800s, *see United States Department of the Interior, Federal Indian Law*, U.S. Government Printing Office (1958), pp. 245-250 (hereafter referred to as "1958 Federal Indian Law"). It was reported that the " ' . . . settled policy of the Government [was] to break up reservations, destroy tribal relations, settle Indians upon their own homesteads, incorporate them into the national life and deal with them not as nations or tribes or bands, but as individual citizens.' " 1958 Federal Indian Law at 249 (quoting Report, Commissioner of Indian Affairs, 1890, p. VI).

the year 1873, which was included with the Secretary's Report. With respect to the Coeur d'Alene Indians in Idaho, the Commissioner of Indian Affairs stated the following:

> AGREEMENT WITH COEUR D'ALENE INDIANS IN IDAHO
>
> In 1867, an executive order was issued setting apart a reservation for the Coeur d'Alenes, but, being dissatisfied with the location, they never located thereon, and continued to roam over the tract of country claimed by them. For the purpose of extinguishing their claim to all the tract of country claimed by them, and of locating them on a reservation *suitable to their wants as an agriculture people*, an agreement has been made by them by Hon. J.P.C. Shanks, J.O.V. Bennett, of Idaho, and Agent J.B. Monteith, subject to ratification by Congress, which is respectfully recommended. Pending such action by that body, *I have deemed it prudent to have set apart by executive order* the tract of country described in said agreement as a reservation for said Indians, in order that white persons may be prohibited from settling thereon and claiming compensation for improvements from the Government. . . . (emphasis added).[9]

Consistent with the statement made in the report of the Commissioner of Indian Affairs, President Grant

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[9] The Annual Report of the Commission of Indian Affairs to the Secretary of the Interior for the Year 1873 (Washington: Government Printing Office (1874)) p. 24 is set forth in H.R. Exec. Doc. No. 1, 43d Cong., 3d Sess. (1873).

signed the executive order dated November 8, 1873, which states the following:

> It is hereby ordered that the following tract of country in the Territory of Idaho be, and the same is hereby, *withdrawn from sale and set apart as a reservation* for the Coeur d'Alene Indians, in said territory, viz: [description of the reservation]. . . . (emphasis added).

Charles J. Kappler, Indian Affairs, Laws and Treaties, p. 837 (Government Printing Office, 1904). On February 8, 1873, the Attorney General of the United States issued an opinion concerning the authority of the President to establish Indian Reservations by executive order. 14 U.S. Op. Att'y Gen. 181 (1873). The Attorney General concluded the President had no general authority to establish Indian Reservations by executive order unless the President was authorized by a treaty or other act of Congress. *Id.* at 182. The Attorney General concluded that Section 14 of the Act of September 27, 1850, 9 Stat. 500 and Section 9 of the Act of February 14, 1853, 10 Stat. 159, restricted the authority of the President to establish reservations in the Territory of Washington and Territory of Oregon. In 1850, Coeur d'Alene Lake was located in the Territory of Oregon. In 1853, Coeur d'Alene Lake was part of the Territory of Oregon. By Act of Congress dated March 2, 1853, the Territory of Washington, which included the northern portion of what is now the State of Idaho, was separated from the Territory of Oregon and the Territory of Washington was established. 10 Stat. 172 *et seq.* It is now established, by acquiescence of Congress, that the President did have authority to withdraw public lands from the operation of the public land laws (*i.e.*, the

Homestead Laws of 1862 and the mining laws of 1872) but the President did not have authority to grant or recognize title in the public lands without express authority from Congress. *Sioux Tribe of Indians*, 316 U.S. at 324-25.

In 1887 and 1889, the United States negotiated agreements with the Coeur d'Alene Tribe. Pet. App. pp. 68, 74-76. The context of other Congressional enactments during the same time frame of the negotiation of the agreements in 1887 and 1889 together with the admission of the State of Idaho on an equal footing with the original states in 1890, and the 1891 Congressional ratification of the 1887 and 1889 agreements does not support ownership of Coeur d'Alene Lake by the United States or the Coeur d'Alene Tribe. The fact that Congress did not ratify the 1887 and 1889 Agreements until after the admission of Idaho on an equal footing implies that Congress did not intend to defeat Idaho's title to the beds of navigable waters. The fact that the Idaho Admission Act of July 3, 1890, 26 Stat. 215, *et seq.* admitting Idaho on an equal footing with the original states makes no specific reference to the Coeur d'Alene Tribe or Lake Coeur d'Alene or the Coeur d'Alene Indian Reservation supports the conclusion that Congress did not intend to defeat Idaho title to Lake Coeur d'Alene as an exception to the equal footing doctrine.

F. There Was No International Duty or Public Exigency Sufficient to Defeat Idaho's Title to the Navigable Waters.

In many previous cases, this Court has concluded that a conveyance of land under navigable waters would

only be upheld because of some international duty or public exigency. *E.g., Montana,* 450 U.S. at 552; *Holt State Bank,* 270 U.S. at 55; *Shively,* 152 U.S. at 58. There is a strong presumption against a conveyance of the beds of navigable waters to defeat State title. *Montana,* 450 U.S. at 552. Conveyance of the submerged lands are not lightly to be inferred. *Id.*

Here, no "international duty" is shown by the findings of the District Court which would support a defeat of state title. The only "public exigency" found by the District Court relates to subsistence. Pet. App. pp. 60-61. The "public exigency" identified by the District Court has never been recognized by this Court as a basis for defeating the title of a State. Furthermore, there is no showing of a public purpose appropriate to the objects for which the United States holds title to the territory prior to Idaho statehood. Such public purpose and intent to defeat state title to submerged lands was established in *Alaska,* 521 U.S. at 40-46. Here, there has been no showing of such public purpose. The general policy of the federal government in the 1880s and 1890s (*supra* at E) shows that Congress did not intend to extend or promote tribal authority or ownership over the submerged lands at issue. Thus, the basic requirements for the defeat of State title do not appear in this case before this Court.

G. Regulation of Commerce with Indian Tribes does not Support Conveyance of Land to the Tribes.

This Court has long recognized that Congress has the power to regulate commerce with Indian Tribes under

United States Constitution, Article I, Section 8, Clause 3. *See Worcester*, 31 U.S. at 556-557, 561; *Cherokee Nation*, 30 U.S. at 18. Pursuant to Congress' authority, Congress frequently regulated commerce and contact with Indian tribes. *See Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 664-65 (1979); *Sioux Tribe of Indians*, 316 U.S. at 322. However, the regulation of commerce by Congress or the regulation of commerce by the Executive pursuant to an act of Congress does not imply or authorize the disposal of land, territory or property by Congress under United States Constitution, Article IV, Section 3, paragraph 2. *Sioux Tribe of Indians*, 316 U.S. at 325-330.

Alaska Pacific Fisheries v. United States may be cited as authority for the conveyance of submerged lands to an Indian Tribe. *See Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 86-89 (1918). *Alaska Pacific Fisheries* involved an act of Congress. *Id.* at 86-87. *Alaska Pacific Fisheries* involved a reservation established by act of Congress. The reservation was in the Territory of Alaska, not a state admitted on an equal footing. (Alaska did not become a state until 1959. 72 Stat. 339 *et seq*; *see also* Proclamation No. 3269 Fed. Reg. 81 (1959)). There are many statutes regulating Indian Affairs that exist today. *See* Title 25 U.S.C. §§ 1-2108. However, with the exception of the facts as outlined in *Choctaw Nation v. Oklahoma*, and *United States v. Alaska*, Congress has not been deemed by this Court to have expressed Congress' intent to defeat state title to submerged lands in favor of an Indian tribe.

H. Rights of the Public Under the Public Trust Doctrine are Inconsistent with Tribal Ownership.

Since the earliest days of our federal government, the policy has been to preserve navigable waters for the use by the public. *See* 1 Stat. 468 (1796), *and* 2 Stat. 235 (1803). This policy and law remains today. *See* 43 U.S.C. § 931; *see also* Ordinance of 1787: The Northwest Territorial Government, Section 14, Article of Compact IV adopted by the Confederate Congress on July 13, 1787; *Gibbons, supra; Martin, supra; Pollard, supra.*

As shown by the Amicus Curiae Brief in Support of Petition, App. pp. 2 and 5, the Coeur d'Alene Tribe claims that it has the exclusive power and authority over the navigable waters within the Coeur d'Alene Indian Reservation. The Tribe further claims that it has the power to exclude or prohibit non-members from using the submerged lands under the navigable waters. This is inconsistent with the public trust doctrine applicable to states as previously announced by this Court. *See Illinois Central Railroad Company v. Illinois*, 146 U.S. 387 (1892). A state holds the beds of navigable waters in trust for use by the public, which includes navigation of the waters and the liberty of fishing on such waters. *Id.* at 452.

The public trust doctrine was actually originally described in *Martin v. Lessee of Waddell*, 41 U.S. at 413-14. In *Martin*, this Court considered the question settled in England that the Magna Carta limited the authority of the King to make a grant of the soils under navigable waters to exclude the public from enjoying such waters, including the right of fishing, navigation, etc. *Id.* at 410. The

interest of the King of England devolved upon the original states by virtue of the Revolution. *Id.* at 416. New states have been admitted on an equal footing with the original states with the same limitations. *Illinois Central Railroad*, 146 U.S. at 435-437. The State of Idaho holds the lands lying under navigable water subject to the public trust doctrine with its limitations imposed on the State. *Kootenai Environmental Alliance*, 671 P.2d at 1093-94. The rights of the public to use the lands underlying navigable waters are well established in the United States and the State of Idaho.

The rights of the public, including the residents of these Amici Counties on navigable waters owned by the United States for the benefit of the Tribe or owned by the Tribe are not established under any law. Tribes are generally not constrained by the Constitutional provisions which govern the federal or state governments. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978); *Talton v. Mayes*, 163 U.S. 376, 384 (1896). If the Coeur d'Alene Tribal Government legislates to exclude non-members on the navigable tribal waters, such Tribal Government is immune from suit unless the Tribe has unequivocally expressed a waiver of its sovereign immunity. *Santa Clara Pueblo*, 436 U.S. at 58-59. Thus, any suit to protect use of the navigable waters by non-tribal persons would be met by the absence of a law protecting the public's rights like the Public Trust Doctrine and the sovereign immunity of the tribe.

The independence of a tribe from the will and law of non-members is illustrated in *In Re: Kang-Gi-Shun-Ca, otherwise known as Crow Dog*, 109 U.S. 556, 572 (1883) and *Santa Clara Pueblo*, 436 U.S. at 69-71. As shown in *Santa*

Clara Pueblo, a tribe establishes, for itself, its own membership rules. *Santa Clara Pueblo*, 436 U.S. at 52, note 2. A person who is not a member of the tribe may not vote in tribal elections or hold office in the Tribal Government, depending upon the tribal laws. *Id.* at 52. The non-member may be excluded from the reservation. *Id.* at 52-53. As previously noted, the Tribe claims that the Tribe may exclude a non-member from the use of the navigable waters within the Coeur d'Alene Indian Reservation by tribal law. Coeur d'Alene Tribal Code, 44-1.01 and 44.2.00 set forth in the Amicus Curiae Brief of Benewah County and Kootenai County of Idaho in Support of the State of Idaho, Petitioner at Appendix pp. 2 and 3.

United States Constitution Article IV, Section 4 guarantees to every State of the Union a republican form of government.

> "[T]he distinguishing factor of that [republican] form [of government] is the right of the people to choose their own officers for governmental administration and pass their own laws in virtue of the legislative power reported in representative bodies whose legitimate arts may be said to be those of the people themselves; but while the people are thus the source of political power their governments, national and state, have been limited by written constitutions, and they have themselves thereby set bounds to their own power, as against sudden impulses of mere majorities."

Duncan v. McCall, 139 U.S. 449, 461 (1891). The public, including members of the Coeur d'Alene Tribe are guaranteed the right to vote in all state and county elections. U.S. Const. amend. XV, § 1; *see also* 42 U.S.C. § 1971(d)(1).

There is no guarantee for the right to vote in tribal elections. Thus, any laws, ordinances, or regulations enacted or promulgated by the Coeur d'Alene Tribe for Lake Coeur d'Alene on the St. Joe River would be established by the Tribal Government of the Coeur d'Alene Tribe, and not by a republican form of government guaranteed by the United States Constitution.

It is difficult to conclude that Congress intended, when the Coeur d'Alene Reservation was established by Executive Order in 1873, when the State was admitted on an equal footing in 1890; and when the 1887 and 1889 agreements were not ratified until 1891, to defeat the sovereignty rights and title of Idaho over Lake Coeur d'Alene and the St. Joe River.

CONCLUSION

This Court should reverse the decision of the Ninth Circuit Court of Appeals. This Court should conclude, from the record, before Congress that the title to the lands underlying navigable waters of Lake Coeur d'Alene and the St. Joe River were held in trust by the United States for the future State of Idaho; and that the submerged lands were granted to the State of Idaho by operation of the Constitution under the Equal Footing doctrine. The

matter should be remanded for the entry of orders and judgment in favor of the State of Idaho.

Respectfully submitted,

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